TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 236.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

BURLINGTON LUMBER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED MARCH 24, 1910.

(22,076)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 13, 1912.

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1 The Supreme Court of North Carolina.

BURLINGTON LUMBER COMPANY, Plaintiff,
v.
SOUTHERN RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

Southern Railway Company, the above named defendant, respectfully shows that on the 2nd day of March, in the year 1910, the Supreme Court of North Carolina, which is the highest court in that State in which a decision in the action referred to herein could be had, rendered a judgment against your petitioner in a certain action in which Burlington Lumber Company was plaintiff, and your petitioner, Southern Railway Company, was defendant.

In said action there was drawn in question by your petitioner, the validity, as applied to this case, of a statute of, or an authority exercised under, the State of North Carolina, to-wit, Section 2631 of the North Carolina Revisal of 1905, on the ground of its being repugnant to the Constitution, and to the laws, of the United States, and the decision of the Supreme Court of North Carolina was in favor of its validity; and in said action a right, privilege or immunity was specifically set up and claimed by your petitioner under the Constitution, and under a statute, of the United States, and the decision of the Supreme Court of North Carolina was against the right, privilege or immunity so set up and claimed; all of which will more fully and in detail appear from the assignment of errors filed herein.

Wherefore, and inasmuch as your petitioner feels aggrieved by the final decision of the Supreme Court of North Carolina in ren-
2 dering judgment against it in this action, it respectfully prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina for the correcting of the errors complained of; that an order may be entered fixing the amount of a supersedeas bond herein; that a duly authenticated transcript of the record and proceedings herein in said Supreme Court of North Carolina may be sent to the Supreme Court of the United States; and that the decision and judgment of the Supreme Court of North Carolina herein may be reversed and annulled.

WILLIAM B. RODMAN,
____ ____,
Attorneys for Southern Railway Company.

STATE OF NORTH CAROLINA,
Supreme Court, To wit:

Let the writ of error above prayed for issue, upon the execution of a bond by Southern Railway Company payable to Burlington Lum-

ber Company in the sum of Four Thousand dollars, such bond when approved to act as a supersedeas.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

3 Supreme Court of the State of North Carolina.

BURLINGTON LUMBER COMPANY, Plaintiff,
v.
SOUTHERN RAILWAY COMPANY, Defendant.

Assignment of Errors for the Supreme Court of the United States.

This was an action instituted by the plaintiff, Burlington Lumber Company, under Section 2631 of the North Carolina Revisal of 1905, to recover of the defendant, Southern Railway Company, a penalty denounced by said section for alleged failure to receive, give a bill of lading for, and forward certain milling machinery. The section referred to is as follows:

"2631. Penalty for Failure to Receive.—Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a side track, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment."

The shipment which it is alleged by plaintiff the defendant company failed to receive, give a bill of lading for and forward was milling machinery alleged to have been tendered by plaintiff, for which plaintiff alleges it requested defendant to issue its bill of lading, and which it is alleged defendant was requested to transport from Burlington, in the State of North Carolina, to Saginaw, in the State of Michigan, being, therefore, an interstate shipment.

4 Southern Railway Company, defendant in the court below, and plaintiff in error in the Supreme Court of the United States, respectfully assigns as errors in the record and proceedings in this cause, in the Supreme Court of North Carolina, the following:

1. The Supreme Court of North Carolina erred in holding that Section 2631 of the North Carolina Revisal of 1905, above referred to, is, as applied to the interstate shipment in the proceedings mentioned, from Burlington, in the State of North Carolina, to Saginaw, in the State of Michigan, a valid exercise of state power; inasmuch as

the state statute referred to is, as applied to the shipment in question, a regulation of interstate commerce which is solely within the power of Congress under Article I, section 8, clause 3, of the Constitution of the United States, the benefit and protection of which Southern Railway Company duly and specially set up and claimed in these proceedings.

2. Said Court erred in holding that the state statute referred to is not, as applied to the interstate shipment in the proceedings mentioned, a regulation of interstate commerce forbidden to the States by being conferred exclusively on Congress by Article I, section 8, clause 3, of the Constitution of the United States, the benefit and protection of which said clause of the Constitution the Southern Railway Company duly and specially set up and claimed in these proceedings.

3. Said Court erred in holding that the state statute referred to is not, as applied to the interstate shipment in the proceedings mentioned, a regulation of interstate commerce beyond the power of the State to make, inasmuch as Congress in the Act to Regulate Interstate Commerce had already acted and had thus assumed jurisdiction over the entire subject matter of this action, the benefit and protection of which Act of Congress the defendant, Southern Railway Company, duly and speci-lly set up and claimed in these proceedings.

4. Said Court erred in denying to the plaintiff in error,
5 Southern Railway Company, the right, privilege or immunity of being governed, in respect to said shipment, solely by the Constitution of the United States and the Act to Regulate Commerce of Congress, and in adjudging said plaintiff in error, in respect to receiving, issuing a bill of lading for, and forwarding said shipment, to be subject to the state statute referred to herein, and in thus denying to Southern Railway Company the right, privilege or immunity aforesaid, which it duly and specially set up and claimed in these proceedings.

5. Said Court erred in holding that Section 2631 of the North Carolina Revisal of 1905 is not unconstitutional and void, as being in violation of Section 1, of Article 14, of the Amendments to the Constitution of the United States, in that it is an arbitrary and unreasonable regulation of common carriers in the conduct of their business, and thus deprives them of their property without due process of law.

6. Said Court, therefore, erred in rendering the final judgment it did render against the plaintiff in error, and which is complained of in this case.

Wherefore, for these and other manifest errors appearing in the record, said Southern Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of North Carolina be reversed, set aside and held for naught, and that judgment be rendered for plaintiff in error, granting it its rights under the Constitution and statutes of the United States, and plaintiff in error also prays for judgment for its costs.

WILLIAM B. RODMAN,

____ ____,

Attorneys for Southern Railway Company.

6 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Burlington Lumber Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of North Carolina, wherein Southern Railway Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of North Carolina, this 18 day of March, 1910.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

Attest:

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk Supreme Court of North Carolina.

I, am attorney of record for the defendant in error in the above-entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

W. H. CARROLL,
Attorney for Burlington Lumber Company.

7 The Supreme Court of North Carolina.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
v.
BURLINGTON LUMBER COMPANY, Defendant in Error.

Bond.

Know all men by these presents, That we, Southern Railway Company, a corporation of the State of Virginia, the principal office of which is in the City of Richmond, in said State, as principal, and Illinois Surety Company, as surety, are held and firmly bound unto Burlington Lumber Company, a corporation of the State of North Carolina, in the full and just sum of Four thousand 00/100 Dollars ($4,000.00), for the payment of which sum, well and truly to be made, we hereby jointly and severally bind ourselves, and each of our successors, firmly by these presents.

Sealed with our seals, and dated this 18th day of March, in the year 1910.

Whereas, lately at a hearing had before the Supreme Court of North Carolina, in a suit depending in said Court between the said Burlington Lumber Company, as plaintiff, and said Southern Railway Company, as defendant, a final judgment was rendered against the said Southern Railway Company, and Southern Railway Company seeks to prosecute its writ of error to the Supreme Court of the United States to reverse said final judgment:

Now therefore, the condition of this obligation is such that if the said Southern Railway Company, as plaintiff in error,
8 shall, prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged against it if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

[Seal Southern Railway Company, June 1894.]

SOUTHERN RAILWAY COMPANY.
By A. B. ANDREWS, *First Vice-President.*

Attest:
GEO. R. ANDERSON.
Assistant Secretary.

[Seal Illinois Surety Company, Chicago, Illinois. Incorporated 1905.]

ILLINOIS SURETY COMPANY.
By A. B. ANDREWS, JR.

Bond approved, and to operate as a supersedeas.

WALTER CLARK.
Chief Justice of the Supreme Court of North Carolina.

9 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the Burlington Lumber Company, a corporation, and the Southern Railway Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of the statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of the clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission; a manifest error hath happened,

to the great damage of the said Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
10 concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, Eighteenth day of March, in the year of our Lord One Thousand Nine Hundred and Ten.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

HIRAM L. GRANT,
Clerk Circuit Court of the United States,
Eastern District of North Carolina.
By GEO. L. TOUNOFFSKI, *D. C.*

Allowed:

WALTER CLARK,
Chief Justice of the Supreme
Court of North Carolina.

11 In the Supreme Court of North Carolina.

BURLINGTON LUMBER COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

Appeal by Def't.

STATE OF NORTH CAROLINA,
Alamance County:

Be it remembered that on the 13th day of April, 1907, the Burlington Lumber Company sued and prosecuted out of the Superior Court of Alamance County a summons in these words:

Summons for Relief.

ALAMANCE COUNTY:

In the Superior Court.

BURLINGTON LUMBER CO., Pl'ff,
vs.
SOUTHERN RAILWAY CO., Def'd't.

Summons for Relief.

State of North Carolina to the Sheriff of Alamance County, Greeting:

You are hereby commanded to summon the Southern Railway Company, the Defendant above named, if it be found within your county, to be and appear before the Judge of our Superior Court, at a court to be held for the County of Alamance, at the Court House in Graham, on the 12th Monday after the first Monday of March, 1907, and answer the complaint which will be deposited in
12 the office of the Clerk of the Superior Court for said county, within the first three days of the term, and let the said defendant take notice that if it fail to answer said complaint within the term, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not and of this summons make due return.

Given under my hand and seal of said Court, this 13th day of April, 1907.

J. D. KERNODLE,
C. S. C. Alamance County.

The foregoing summons is endorsed as follows: No. 1233. Burlington Lumber Co., Pl'ff, vs. Southern Railway Co., Def'd't. Summons for Relief. Returnable to May Term, 1907, of the Superior Court of Alamance County. Received April 15th 1907. Served April 15, 1907, by delivering a copy of this summons to J. B. Richardson, agent of the Defendant Co., at Graham Station, Graham, N. C. Fee —. Mileage, $.60. A. T. Kernodle, Sheriff Alamance County, by C. R. Kernodle, Deputy Sh'ff. W. H. Carroll, Pl'ff's Att'y.

Bond for Costs.

BURLINGTON LUMBER CO., Pl'ff,
vs.
SOUTHERN RAILWAY CO., Def'd't.

We, Burlington Lumber Co., the Plaintiff, and W. E. Hay, our executors and administrators are bound to the Defendant,
13 Southern Railway Company in the above entitled action, in the sum of Two Hundred Dollars. This obligation to void

upon the condition that the said Plaintiff, Burlington Lumber Company, shall pay to the Defendant all such costs as the Defendant may recover of the Plaintiff in said action; otherwise to remain in full force and effect.

Witness our hands and seals, this 13th day of April, 1907.

BURLINGTON LUMBER CO. [SEAL.]
By W. E. HAY, *Prest.*
W. E. HAY. [SEAL.]

In the presence of
W. H. CARROLL.

I hereby approve of the sufficiency of the sureties of the above bond, and summons issued accordingly.

J. D. KERNODLE, *C. S. C.*

Complaint.

NORTH CAROLINA,
Alamance County:

In the Superior Court, May Term, 1907.

THE BURLINGTON LUMBER COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

The plaintiff alleges.

1. That the plaintiff is a corporation organized and existing under the laws of the State of North Carolina

2. That the Southern Railway is a corporation, chartered and organized according to law, and is now and has been for some time doing a general railroading business in this State, having a
14 depot and agents at Burlington, N. C., for the purpose of receiving and shipping freight and for collecting tolls and charges for the same.

3. That on the 28th day of January, 1907, the plaintiff company delivered to the defendant company at Burlington, N. C., certain Milling Machinery, including one Disk, one crate sheet iron, eight bundles of machinery irons and one fan for wood-working machine, weighing in all 3,150 pounds, with instructions to ship the same at once to the Allison and Curtis Manufacturing Company, at Saginaw, Michigan, and plaintiff company then and there offered to pay the freight charges in advance, whatever they might be, and was ready, able and willing to pay the same.

4. That the defendant company received said goods at its warehouse or depot at Burlington, N. C., for shipment, on the 28th day of January, 1907, but at the time failed to give plaintiff a bill of lading for the same, the defendant's agent at Burlington, as an excuse for not doing so, saying that he did not know the freight rates on said

goods, but would ascertain the same and ship promptly to the consignees, and look to plaintiff for the freight charges, and at the same time received said goods in its warehouse for storage to be shipped as alleged.

5. That after so receiving said goods for transportation the defendant company negligently and carelessly retained the same without shipment in its warehouse at Burlington, N. C., and without giving plaintiff a bill of lading as it was in law and duty bound to do, until the 3rd day of April, 1907, when it gave plaintiff a bill of lading for same, and at that time shipped said goods after wrongfully and negligently failing to ship the same without the consent
15 of plaintiff company for the space of sixty-five days.

6. That the plaintiff company oftentimes called on the defendant company, and urged the shipment of said goods, but defendant's agent, at Burlington, informed plaintiff all of said times that he did not know the freight rates, and made no efforts to ascertain the same, although he well knew that plaintiff was anxious about the shipment, and was ready, willing and amply able to pay the same in advance; and this situation continued, until the 3rd day of April, 1907, as aforesaid, when the defendant collected the freight charges of plaintiff and gave it a bill of lading for said shipment.

7. That there was from the foregoing facts, a refusal of the defendant company to receive said goods for transportation when tendered, and to give a bill of lading for the same as required to do under the laws of this State, and for sixty five days thereafter, continued to neglect, fail and refuse to ship said goods, upon no other excuse than that it did not know the freight rates on said shipment.

8. That for the failure and neglect of the defendant company to receive said goods for transportation when tendered, and to ship them promptly as in law and duty it was required to do, the plaintiff has been greatly damaged, and the defendant company is indebted to plaintiff by way of a Statutory penalty of fifty dollars per day for the term of sixty-five days, less the time prescribed by law to ship the same, not exceeding a period of four days, and for said neglect is indebted to said plaintiff company for said failure $3,050.00, for said neglect and breach of duty.

9. That plaintiff forgives and remits to the defendant
16 company all of said penalty in excess of two thousand dollars, together with the interest on the said excess.

10. That the plaintiff company has demanded of the defendant company the sum of two thousand dollars in satisfaction of said penalties and damages, but it refused and continues to refuse to pay the same.

Wherefore, plaintiff prays judgment against the defendant company for two thousand dollars, and for such other and further relief as it is in law and equity entitled to.

W. H. CARROLL,
Att'y for Pl'tff Co.

W. E. Hay being duly sworn says that the foregoing complaint is true of his own knowledge, except as to those matters stated on in-

formation and belief, and as to those matters he believes it to be true, and that affiant is president of the Burlington Lumber Company, the plaintiff, which is a corporation, and having its office and principal place of business at Burlington, N. C.

W. E. HAY, *Prest.*

Sworn to and subscribed before me this the 13th day of April, A. D. 1907.

A. L. DAVIS,
Notary Public.

[NOTARIAL SEAL.]

The foregoing complaint is endorsed as follows: Burlington Lumber Co. vs. Southern Railway Co. Complaint. Filed April 13th, 1907. J. D. Kernodle, C. S. C.

17 *Answer.*

NORTH CAROLINA,
Alamance County:

BURLINGTON LUMBER CO.
vs.
SOUTHERN RAILWAY COMPANY.

I.

General Denial.—Action barred by Statute of Limitations as cause of action arose more than one year before the suit was brought.

II.

Freight in question moved in ordinary and reasonable time.

III.

Absolute inability under existing conditions, resulting from abnormal increase of business, lack of cars, lack of engines, lack of labor and other causes, mainly beyond control of defendant to sooner move the freight in question.

IV.

The Act of the General Assembly of North Carolina under which this action is brought is unconstitutional for that:

(*a*) The defendant is engaged in the transportation of freight and passengers and United States Mail between many of the States of this Union, and the penalties imposed and sought to be recovered in this case are unduly burdensome, and an imposition upon Interstate Commerce.

18 (*b*) It imposes undue burdens upon the agencies and instrumentalities of commerce, and imposes and enforces preference in favor of intra-state freight as against interstate freight.

(*c*) The effect of the act is to unduly burden, and is an imposi-

tion upon the agencies and instrumentalities of the defendant used in carrying the United States Mails, through and among several of the United States.

(*d*) The effect of the Act is to take the property of the defendant without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States.

(*e*) It is an unjust discrimination against one citizen in favor of another.

PARKER & PARKER,
KING & KIMBALL,
Attorneys for Defendant.

The foregoing is endorsed as follows: Burlington Lumber Co. vs. So. Ry. Co. Ans. Filed June 22, 1907. J. D. Kernodle, C. S. C.

Amended Answer.

NORTH CAROLINA,
Alamance County:

In the Superior Court.

THE BURLINGTON LUMBER COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

The defendant for answer to the allegations made in the several articles of the complainant, says:

19

I.

The allegations of the third article of the complaint are, on information and belief, denied as therein stated, and the facts are as hereinafter set out.

II.

The allegations of the fourth article of the complaint are, on information and belief, denied as therein set out and the facts are as hereinafter stated.

III.

The allegations of the fifth article of the complaint as therein stated are, on information and belief, denied, and the facts are as hereinafter set out.

IV.

The allegations of the sixth article of the complaint are, on information and belief, denied as set out, and the facts are as hereinafter stated.

V.

The allegations of fact made in the seventh article of the complaint are, on information and belief, denied except as hereinafter set out.

VI.

The allegations of the eighth article of the complaint as therein set out are, on information and belief, denied except as hereinafter stated.

VII.

The allegations of the tenth article of the complaint are, on information and belief, denied, except that as this suit may operate as a demand.

The facts in regard to the matters and things alleged in the complaint in this case are as follows:

That some time in January, 1907, the plaintiff through its agent and representatives, put upon the platform of this defendant
20 in Burlington a lot of machinery to be shipped to a point in Michigan; that there were no marks nor directions of any kind on any part of the said machinery, nor place designating the consignee or the point of destination; that the plaintiff's agent inquired of defendant's agent as to a rate for such machinery to Saginaw, Michigan, at the same time saying that the plaintiff desired to prepay the freight as soon as the amount thereof could be ascertained; that the agent of the defendant did not know the rate nor designate any amount which the plaintiff wanted to pay, nor did he ever tender or offer to pay any sum of money at all till after the freight had been shipped from Burlington; that the agent of the defendant stated to the agent of the plaintiff that he did not know the rate, that he would ascertain as early as he could what the rate was, which he did, and as soon as ascertained the goods were shipped; that no money was ever tendered to this defendant or its agent or representative by the plaintiff, or any one representing it, till after the goods had been shipped, when the amount of the freight in accordance with the rate and character of the freight had been ascertained and the goods gone; that when the said goods were brought and put upon the platform of this defendant the same had not been weighed, and in consequence of that as well as the fact that the defendant's agent did not know the rate, the goods were not ready for shipment, and were not ready in consequence of the lack of weight, directions, etc. till after the rate was ascertained, and at the time the goods were shipped; that the delay on the part of the defendant, if it can be charged to the defendant, which it denies, was not intentional but was in consequence of the matters and things hereinbefore set out.

21 This defendant is advised and avers on information and belief that this plaintiff had no interest in the property so shipped; that it was a return to the real owners of the property of some goods which had been sent out on trial to the plaintiff, and which on trial it rejected or refused to accept.

This defendant for further answer says, on the advice of counsel, that the Act under which this action is brought is unconstitutional and void, for that, among other things, the effect of the act is to unduly burden and is an imposition upon the agencies and instrumentalities of the defendant used in carrying the United States

mails and freights and commerce generally between the States, and the effect of the Act is to take the property of the defendant without due process of law and in violation of the Constitution of the United States, and especially those provisions referring to interstate commerce in the 14th amendment to the said Constitution, and is unjust and discriminative against one citizen in favor of another.

PARKER & PARKER,
KING & KIMBALL,
Att'ys for Def't.

W. B. Devlin, being first duly sworn according to law, makes oath and says that he is agent of the defendant company above named, and that the foregoing answer is true of his own knowledge except as to matters and things therein set out on information and belief, and as to these he believes it to be true.

W. B. DEVLIN.

Subscribed and sworn to before me this the 3rd day of July, 1907.
[NOTORIAL SEAL.] A. B. KIMBALL, *N. P.*

22 The foregoing answer is endorsed as follows: No. 128. The Burlington Lumber Co. vs. Southern Ry. Co. Ans. Filed July 5, 1907. J. D. Kernodle, C. S. C.

Issues and Verdict.

And thereafter at a regular term of the Superior Court of Alamance County, begun and held on the twelfth Monday after the first Monday of March, 1909, it being the 24th day of May, 1909, with Honorable B. F. Long, Judge Presiding, the following proceedings were had:

Thereupon this cause coming on for trial, the following jurors, to-wit:

1. A. C. Andrew,
2. Thos. A. Burke,
3. H. G. Freshwater,
4. Joe E. Perry,
5. C. T. Holt,
6. Geo. J. Huffines,
7. W. H. Ingold,
8. Chas. P. Shepherd,
9. Albert C. Atkinson,
10. H. M. Scott,
11. M. G. Thomas,
12. Thos. M. Roberson.

were chosen, tried, sworn and empaneled to try the issues joined between the parties, and thereupon after the charge of the Court said jurors heretofore empaneled in this case for their verdict found the issues submitted to them as follows:

1. Did the defendant company through its agent or officers unlawfully refuse to receive for shipment certain milling machinery, as named in complaint?

Ans. Yes.

2. If so, for how many days did the defendant company or its officers or agents so fail and refuse to receive said goods for shipment?

Ans. 61 Days.

23 *Judgment.*

NORTH CAROLINA,
Alamance County:

In the Superior Court, May Term, 1909.

BURLINGTON LUMBER COMPANY, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY, Defendant.

This case coming on to be heard before His Honor, B. F. Long, Judge Presiding, and a jury, upon the following issues, to-wit:

1. Did the defendant company through its agents or officers unlawfully refuse to receive for shipment certain milling machinery as named in the complaint?

2. If so, for how many days did the defendant company or its officers or agents so fail and refuse to receive said goods for shipment?

And the Jury having answered the first issue, "Yes"; and the second issue, "Sixty-one Days", and it appearing to the court that the plaintiff company in its complaint forgave and remitted to the defendant company all of said demands in excess of Two thousand dollars together with the interest on said excess:

Now therefore on motion of W. H. Carroll, Esq., attorney for plaintiff company, it is ordered, adjudged and decreed that the plaintiff, Burlington Lumber Company, recover of the defendant, Southern Railway Company, the sum of Two thousand dollars with interest thereon until paid.

24 It is further ordered and adjudged that the defendant company pay the costs of this action to be taxed by the Clerk of this court.

B. F. LONG,
Judge Presiding.

Motion for new trial—denied. Defendant excepts. Judgment. Exception. Appeal. Notice waived. $25 appeal bond adjudged sufficient. 45 days allowed def't to serve case on appeal and 45 days thereafter to except or file counter case.

LONG, *Judge.*

Defendant's Case on Appeal.

NORTH CAROLINA,
Alamance County:

In the Supreme Court.

This was a civil action tried before His Honor, B. F. Long, Judge, and a Jury, at the May Term, 1909, of Alamance Superior Court. The pleadings will show the contention of the parties. The following was all the evidence in the case.

WILLIE WILSON, witness for the plaintiff, testified:

Q. Where do you live, Mr. Wilson?
A. Burlington, N. C.
Q. Where were you living on the 28th of January, 1907?
A. Burlington, N. C.
Q. Where were you working at that time?
A. For W. E. Hay, his clerk in his store.
25 Q. What connection did W. E. Hay have with the Burlington Lumber Co.?
A. He was President.
Q. You were working for both concerns?
A. Yes, sir, I stayed in the store all the time mostly.
Q. Who was agent of the Southern Railway Co., at that time at Burlington, N. C.?
A. Mr. D. W. Johnston.
Q. State whether or not on or about the 28th day of January, 1907, did you deliver any machinery to the Southern Railroad Co. for shipment?
A. Yes sir.

First Exception.

Defendant objects, objections overruled, defendant excepts.

Q. What day was it that you delivered the goods?
A. 28th of January, 1907.
Q. What did you deliver?
A. Blow pipe machinery to carry the dust away from other machinery.
Q. State now what you said to the agent when you delivered it to him.
A. I asked for bill of lading. He said he did not have the rate and could not give it to me.
Q. What were you asking bill of lading for?
A. To ship it to Allison & Curtis Mfg. Co.
Q. Where?
A. To Michigan.
Q. State whether or not the machinery was marked for shipment.
A. Yes sir.
Q. Who marked them?
A. I marked them.
26 Q. To what address?
A. Allison & Curtis Mfg. Co., Saginaw, Mich.
Q. Do you know what this stuff weighed?
A. Something about three thousand pounds.
Q. What did you tell Mr. Johnston to do with the goods?
A. I told him to ship them.
Q. As you directed them?
A. Yes sir.
Q. What was his conversation with you?
A. Said he would ship them as soon as he got rate.

Q. State whether you offered to pay the freight or not.
A. Yes sir. I told him I would prepay the freight and he said he did not know what it was.
Q. Was you ready and willing to pay the freight?
A. Yes sir.
Q. State whether Mr. Johnston received the freight in the depot on that same day?
A. Yes sir.
Q. State whether or not he gave you the bill of lading on that same day?
A. No sir.
Q. What was his excuse for not giving you bill of lading?
A. He said he did not have the rates. He said as soon as he got the rate he would give B. L.
Q. Did you go back there any time, soon after that to see what had become of the goods?
A. Yes sir, several times.
Q. How many times?
A. Some ten or fifteen times. I asked him if he had found out the rates and he said, No.
27 Q. State whether you offered to prepay the freight?
A. Yes sir.
Q. State what you said about the importance of the shipment.
A. I told him that it was to be there on a certain date, as well as I remember, and we wanted to get it off as soon as we could.
Q. Did you ever get a B. L.?
A. Yes sir.
Q. When?
A. About the 3rd of April.
Q. Were the goods shipped that day?
A. Yes sir, I think they were.
Q. Is this the B. L. you got? (Att'y showing the witness a B. L.)
A. Yes sir.
Q. The original B. L.?
A Yes sir.
Q. What is the date?
A. April 3rd.
Q. Dated where?
A. Burlington, N. C.
Q. What is it about?
A. Shipment to Allison & Curtis, Saginaw, Mich., signed by D. W. Johnston.

Plaintiff offers B. L. in evidence, same is marked as "Exhibit A," and admitted.

Q. You paid the freight that day?
A. Yes sir.
Q. You say you have been ready and willing to pay it every day since it has been there?
A. Yes sir.

28 Q. That was the first opportunity that you knew what the amount was?
A. Yes sir.

Cross-examination:

Q. Do you work for the Burlington Lumber Company or Mr. Hay?
A. I work for Mr. Hay.
Q. Did you take these goods to the Burlington Depot yourself?
A. The drayman carried them. I went along.
Q. Did you go on the dray with him?
A. No sir.
Q. What was done with the goods when they reached the Burlington Depot?
A. They were put in the depot.
Q. Were they put in the depot or down on that shed?
A. It was late that evening when we hauled them down there and I think the depot was closed.
Q. Where were the goods put when they were taken down there to the depot?
A. On the platform.
Q. That was after the depot was closed?
A. Yes sir.
Q. What month was that?
A. 28th of January.
Q. Now, Mr. Wilson, did you see Mr. Johnston that night?
A. No sir. I did not see him until the next morning.
Q. At the time the goods were taken down there and put on the platform you did not see Mr. Johnston at all?
A. No sir. Not that evening.
29 Q. The next morning you saw Mr. Johnston, you told him about the shipment, he told you he did not know the rate and you said all right find it out?
A. Yes. He said that he did not know the rate, he would find it out and I told him very well.
Q. Now you say these goods were marked, how were they marked?
A. Allison & Curtis, Saginaw, Mich.
Q. How?
A. On a tag.
Q. How was that attached if any way to the machinery?
A. Attached on with a string to the end.
Q. Did you do that marking?
A. Yes sir.
Q. When?
A. The next day.
Q. The next day was when you had this conversation with Mr. Johnston and when he told you he did not have the rate and would get, and you said that was all right and left?
A. Yes sir.
Q. Had you weighed the goods?
A. No sir. Not then.

Q. When did you weigh these goods?
A. I think a few days after that.
Q. Where?
A. In the depot.
Q. Were they inside the depot or outside when you weighed them?
A. In side.
Q. Did you have a talk with Mr. Johnston that day?
A. Yes sir. I asked Mr. Johnston if he had gotten the rate. I told him I wanted to ship it and get it off as soon as he could.
30 Q. How long before you went back there again?
A. I suppose some two or three days.
Q. What did you say to Mr. Johnston at that time?
A. I asked him if the had that rate for the machinery. He said he had not. I told him we were ready to pay him whenever he found out what it was.
Q. Did you stay at the Burlington Lumber Co. all the time?
A. No sir. I stayed in the store.
Q. How was it then that you were out there looking after this shipment?
A. Mr. Hay is President of it and he would send me anywhere he wanted me to go.
Q. The goods were finally shipped and you received this B. L.
A. Yes sir.
Q. That was a lot of machinery for wood working business was it not?
A. Yes sir.
Q. That machinery was shipped to the Burlington Lumber Co. on trial and if they liked it they were to keep it and if not they were to return it?
A. I won't say for sure.
Q. Mr. Wilson, don't you know as a matter of fact that that was machinery that did not belong to the Burlington Lumber Co. and was being returned to these people in Michigan?
A. It was exchanged for other machinery.
Q. It was shipped there on trial was it not?
A. I think it was. I won't be sure.
Q. It was not the property of the Burlington Lumber Co., at all. It was the property of these people at Saginaw, Mich., was it not?
A. I suppose it was.
31 Q. Who did it belong to?
A. I reckon it belonged to the Saginaw Michigan Company.
Q. Did you ever on either of these trips tender the Burlington Agent of the Southern Railroad Co. any money?
A. No sir. I told him I would pay him if he found out the amount that the freight was.
Q. I will ask you, Mr. Wilson, if this freight was ever paid?
A. Yes sir, we paid it.
Q. Who paid it?
A. The Burlington Lumber Co.
Q. Did they pay cash or check?

A. Cash I think.

Q. Do you know whether they ever paid this freight of your own knowledge?

A. Yes sir. I think they paid it.

Q. Did you pay it?

A. Yes sir. I think I did.

Q. What did you pay it in, check or money?

A. I think I paid it in money.

Q. Don't you know that the Burlington Lumber Co. got freight and shipped freight, and that Mr. Johnston rendered them bills from time to time?

A. Yes sir.

Q. You do know that at no time that you turned over to the Southern R. R. Co. any money?

A. I know that I told them that I didn't have the money, but would pay him as soon as I found out what the freight was.

Q. You never did go there and pay the freight.

A. No sir.

32 D. W. JOHNSTON, witness for the plaintiff, testified:

Q. Where were you living on the 28th of January, 1907?

A. Burlington, N. C.

Q. What was your business at that time?

A. Local Agent for the Southern R. R. Co.

Q. Did you at that time execute and deliver a B. L. to the Burlington Lumber Co. for shipment of this stuff we are talking about?

A. Yes sir.

Q. Look at that paper (showing witness "Exhibit" A) and see if that is the one you delivered?

A. Yes sir. It looks like it.

Q. What date is it?

A. April 3rd, 1907.

Q. How long had these goods been in your care for shipment before that date?

A. I don't remember exactly, a month or six weeks, I suppose, or something like that they had been out there on the platform.

Q. Who brought them there?

A. I suppose they were delivered by the Burlington Lumbers Co.'s drayman.

Q. Who was the first one you saw in regard to this shipment?

A. Mr. Wilson, as well as I remember.

Q. Were they addressed to anyone or not?

A. Not that I know of.

Q. To whom were they addressed or marked.

A. I never went to look at them.

Q. When did you see them?

A. I saw them several times in passing.

33 Q. Do you know whether they were marked or not?

A. I know that I wrote several tags and marked them. They might have been marked and the tags may have gotten torn off.

Q. How did you know who to mark them to?
A. They told me who to.
Q. Did you weigh them?
A. Yes sir.
Q. Who did you ship them to?
A. Some firm in Michigan.
Q. Why did it stay there so long?
A. I shipped it the same day I weighed it.
Q. When did Mr. Wilson first speak to you about this shipment?
A. When it was first spoken of Mr. Wilson came to see me after closing time. We did not know the weight and could not weigh it then and give B. L. I told him I would get rate and ship it as soon as I received it.
Q. When did you try to get the rate?
A. Next day as well as I remember.
Q. When did you try to get the rate?
A. According to that B. L. about the first of April.
Q. From where did you get it?
A. Division Freight Agent's office, Greensboro, N. C.
Q. You were from the 28th of January, 1907 to the third of April getting rates from Greensboro?
A. Yes sir.
Q. How far is Greensboro from Burlington?
A. Twenty-one miles.
Q. Then you were about 65 days getting the rate that you did. You let the goods go as soon as yo*t* — the rates?
A. Yes sir.
34 Q. How often did Mr. Wilson or Mr. Hay come to see you about those goods while they were there?
A. Mr. Hay never did come. Mr. Wilson came, I think it was, three or four times.
Q. Did any more of Mr. Hay's men come to see you about it?
A. No sir.
Q. How many men did you keep in the office assisting you at the depot?
A. Two I think.
Q. State whether or not he offered to pay you the money?
A. No, he did not offer me any money.
Q. He did offer to prepay the freight did he not?
A. Yes. He said he wanted to ship it prepaid, and was ready to prepay it, whenever I presented the bill.
Q. You had been doing business a long time with Mr. Hay had you not, and your custom was to send him the bill?
A. Yes sir.
Q. You knew that he was able and willing to pay the freight?
A. I did not doubt that at all.
Q. That was not the reason you did not ship it?
A. No sir.

Cross-examination:

Q. Mr. Johnston, state when and what time of day you had an interview with Mr. Wilson about this shipment?

A. I don't remember the exact date. It was after dark on the night when the goods were brought there that I had an interview with Mr. Wilson.

35 Q. What date was that?

A. Twenty-eighth of January.

Q. What was the custom at Burlington about the hours of receiving freight?

A. We are supposed to open at seven and close at 5 P. M.

Q. Was this after five and how much?

A. As well as I can remember it was something near eight o'clock.

Q. Who came to you then?

A. Mr. Wilson and he told me he had some machinery, or blow pipe or something, out there to ship.

Q. I asked him if he knew how much it weighed?

A. He said he did not. I told him I could not make B. L. until it was weighed up?

Q. What did he say about that?

A. He said that would be all right.

Q. When did you see him next?

A. Probably two or three days afterward.

Q. In the meantime had you seen that freight?

A. I noticed some of the pipes lying out there on the platform.

Q. When you saw Mr. Wilson next, state what passed between you and him?

A. He asked me if I had gotten the rate yet? I said No.

Q. Was that all?

A. As well as I can remember.

Q. How long after that you saw him again?

A. I expect it was a week. I don't remember, but think it was a week.

Q. State what passed?

A. About the same conversation. He said they were get-

36 ting anxious to ship it and would like to get it off as early as they could.

Q. That was all that passed that time?

A. Yes sir, I think so.

Q. When was the next time?

A. A day or so afterward he asked me if I had gotten the rate yet. I said I have written twice for it and have not received it yet. I then said I will call them up at Greensboro over the long distance phone, which I did and they promised to send the rate that afternoon or the next morning. I received it the next morning.

Q. Did you have the weight of it at this time?

A. No.

Q. The next morning what did you do?

A. I had my men weigh it up.

Q. Did you see it marked to anybody?

A. I did not see any tags on it. One piece had a name plate on it.

Q. A metal piece like is used on machinery generally?

A. Yes sir.

Q. Any marking who it was to be shipped to?

A. No sir.

Q. Who fixed the tags on it?

A. I wrote out the tags and had my men to fasten them on.

Q. How did you collect the freight?

A. I sent the bills to Mr. Hay's store.

Q. Did you get money or check?

A. I don't remember sometimes he paid money and sometimes check.

Q. You say Mr. Hay never did see you about this?

A. I don't think he did. I don't remember if he did.

37 Q. In your conversation with Mr. Wilson what did he tell you about this stuff?

A. He told me it was consigned or rather shipped on approval and was to be returned if not satisfactory and another one was to take its place, and they were returning it.

Redirect examination:

Q. This place that this machinery was put; was that where they unloaded freight, machinery, etc.?

A. Sometimes they did and sometimes did not. It is a shed that we used for very heavy freight.

Q. Did you weigh or attempt to weigh the stuff before you got the freight rates?

A. No sir.

Q. When you asked for the rate you did not tell them what the weight was, because you did not know?

A. No sir.

Q. When you finally got the rate you got it over a long distance telephone?

A. Yes sir. I called him over the long distance telephone and he could not tell me that evening, but wired me the next morning.

Q. You had a 'phone in your office and could talk at any time and then waited sixty-five days before telephoning?

A. Yes sir, I could phone by paying for it. I was not in the habit of telephoning over the long distance 'phone, as it cost 20¢. to do it. I had written them twice at Greensboro and did not hear and they were getting anxious for shipment and I was too. That was the reason I done it.

38 This was all the evidence in the case.

The defendant in apt time requested the Court in writing to charge the jury as follows:

First. This suit is brought to recover a penalty of $2,000.00 under Section 2631 of the Revisal of 1905, which said Section provides: The agents or other officers of railroads and other transportation

companies, whose duty it is to receive freight shall receive all articles of the nature and kind received by such company for transportation, when tendered at the regular depot, station, wharf or from loaded car tendered at sidetrack or any warehouse connected with the railroad by siding and shall forward same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person, refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of Fifty Dollars for each day said company refuses to receive said shipment of freight and all damages actually sustained by reason of the refusal to receive such freight. (Not given.)

Second Exception.

Second. In this case it is alleged that on the 28th day of January, 1907, the plaintiff company delivered to the defendant company at Burlington, N. C., certain milling machinery including one disk, one crate sheet iron, eight bundles of machinery irons and one fan for wood-working machine, weighing in all 3,150 lbs., with *with* instructions to ship same at once to the Allison & Curtis Mf'g Co., at Saginaw, Mich. It is further alleged that the defendant company received said goods at its warehouse or depot at Burlington, N. C., for shipment on or about the 28th day of January,
39 1907, but at that time the defendant company through its agent failed and refused to give the plaintiff a bill of lading for the same. The defendant's agent at Burlington, N. C., gave as an excuse for not doing so, that he did not know the freight rate on said goods, but would ascertain same and ship promptly to the above named consignees and look to the plaintiff for the freight charges, and at that time defendant company received said goods in its warehouse for storage to be shipped as alleged. The defendant on *on* the other hand contends that some time in January, 1907, the plaintiff put upon the platform of the defendant company at Burlington, N. C., a lot of machinery to be shipped to some point in the State of Michigan. That there were no marks nor directions of any kind on said machinery, nor was there anything designating consignee or destination. The defendant further contends that the plaintiff's agent inquired of defendant the rate for such machinery to Saginaw, Mich., at the same time advising defendant that plaintiff desired to prepay the freight as soon as the amount thereof could be ascertained. The defendant further contends that it ascertained the freight rate as soon as it could do so, and that the goods were shipped as soon as the rate could be ascertained and published in accordance with the law. The plaintiff further contends that at divers times between the 28th of January, 1907, and the 3rd day of April, 1907, the plaintiff's agent called on defendant's agent and urged defendant to ship said goods. The plaintiff further contends that the goods were not shipped until the 3rd day of April, 1907, and, that it is entitled to recover penalty of $50.00 for each and every day between the 28th day of January and the 3rd day of

April, 1907. The defendant denies that there was any tender
40 of said goods at any time and denies that said goods were properly marked and properly tagged for shipment, and denies that there was any demand for bill of lading, and, if any demand was made it was only one demand. The defendant further contends that the statute in question has no application to the facts in this case, and, further contends that the statue is in violation of the laws of the United States and is void. (Not given.)

Third Exception.

Third. The Court charges you that the constitution of the United States is the supreme law of the land; that under the constitution of the United States Article I, Sec. 8, Clause 3, the Congress of the United States is given power to regulate commerce between the states. That this power to regulate commerce between the state- is exclusive? The Court further charges the jury that the Congress of the United States has passed an act regulating commerce between the states which said act as passed by the Congress of the United States is the supreme law of the land and regulates said commerce and excludes all State regulation of interstate commerce. That by the terms of the said act of the Congress of May 4th, 1887, 24th Stat. L. 379 and the various amendments thereto and especially by the amendment of June 29th, 1906, 54th Stat. L. 584, it is provided that no carrier unless otherwise provided under said act shall engage or participate in the transportation of passengers or property from one state or territory of the United States or District of Columbia unless the rates, fares and charges upon which the same are transported by said carrier have been *and* filed and published in accordance with the provision of the said act. That by the terms of the said act every common carrier engaged in the business
41 of transporting passengers or property whether by railroad or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage from one state or territory of the United States or District of Columbia to any other state or territory of the United States or District of Columbia, should print and file with the Interstate Commerce Commission created by said act all rates, fares and charges for transportation between different points on its own line and on the route of any other carrier by railroad by pipe line or by water when a through and joint rate had been established. That the said act of Congress exclusively regulates the terms and conditions upon which the railroad shall receive freight for shipment from one state to another state. If the Jury find from the evidence in this case that the plaintiff or its agent carried to the depot of the defendant company at Burlington, N. C., a lot of machinery and offered to pay the freight charges in advance, and the defendant company received the said goods at its warehouse or depot for shipment and refused to execute a bill of lading for the same, the agent stating he did not know the freight rate on said goods but would ascertain same and ship promptly to the consignees at Saginaw, Mich., and if

the jury further find that at the time the said goods were received at the said warehouse that no bill of lading was issued, the jury should answer the first issue No. For that the act of receiving the goods by the defendant company and issuing a bill of lading therefor, said goods to be carried from Burlington, N. C., to Saginaw, Mich., would be an act of Interstate Commerce and would be by the laws of the United States prohibited unless the defendant company and the other railroads over which the said goods would
42 have to be transported had published and filed with the Interstate Commerce Commission a list or schedule of the rates and charges for carrying said freight, or, had separately filed a schedule of rates over the lines the said freight would have to pass. The burden is upon the plaintiff to make out its case and in order to do so the plaintiff must show to the satisfaction of the Jury by the preponderance of the evidence that at time of the alleged tender, to-wit, on or about Jan. 1907, the defendant company had established and filed with the Interstate Commerce Commission a through rate from Burlington, N. C., to Saginaw, Michigan, or that rates had been filed and published by each road over which said shipment would pass and there being no evidence that such rate had been filed with the Interstate Commerce Commission, the plaintiff has failed to make out its case. (Not given.)

Fourth Exception.

Fourth. If the Jury find from evidence that the plaintiff company through its agent on or about the 28th day of January, 1907, carried to the depot of the defendant company at Burlington, certain machinery and gave defendant company instructions to ship same at once to the Allison & Curtis Mfg. Company, at Saginaw, Michigan, and the plaintiff company then and there offered to pay the freight charges in advance, whatever they might be, and was ready, able and willing to pay same; and if the jury further find from the evidence that the defendant company received the said goods at its warehouse or depot at Burlington, N. C., for shipment on the 28th day of January, 1907, but at that time failed to give plaintiff a bill of lading for the same, the defendant's agent at Burlington stating that he did not know the freight rate of said
43 goods but would ascertain the same and ship promptly to the above named consignees and look to the plaintiff for the freight charges, and at that time the defendant received the said goods in its warehouse for storage to be shipped as aforesaid, then the act of tendering said goods for shipment, and the act of issuing bill of lading therefor, agreeing to tranpport the same from Burlington, N. C., to Saginaw, Michigan * * * and all of said acts would constitute Interstate Commerce and be a part of the things necessary to be done in the transportation of freight from Burlington, N. C., to Saginaw, Michigan, and would constitute an act of Interstate Commerce and as such would under the Constitution of the United States and the laws of Congress passed pursuant thereto, the benefit and protection of which this defendant now claims, be

governed by the laws of the United States, and the defendant company would under the laws of the United States, the benefit and protection of which it now claims, be prohibited from shipping said freight and issuing a bill of lading therefor, and receiving the freight charges from the plaintiff until either a through rate or a separate rate over each line, which would constitute a through rate, had been established and filed with the Interstate Commerce Commission from Burlington, N. C., to Saginaw, in the State of Michigan, in accordance with the laws of the United States, to-wit: the act of Congress approved Feb. 4th, 1887, 24 Stat., 378 and the amendments thereto, and especially the amendment of June 29th, 1906, 34 Stat. L. 584; that the burden is upon the plaintiff to show that at the time of the tender and demand for shipment and the execution of the bill of lading, that there was on file with the Interstate commerce Commission a through rate over the defend-
44 ant's line and other lines over which said freight would necessarily have to move, or that there was on file with the Commission rates for each of the lines over which said freight would move. That there is no evidence in this case that any such rates had been filed with the Interstate Commerce Commission, as required by the laws of the United States, and the Jury will upon the evidence answer the first issue No. (Not given.)

Fifth Exception.

Fifth. If the jury find from the evidence that on or about the 28th day of January, 1908, the plaintiff's agent carried to the depot of the defendant Company at Burlington, N. C., one lot of machinery and that the defendant company received said goods at Burlington, N. C., and that plaintiff gave instructions that said goods be shipped at once to Allison & Curtis Mfg. Company, Saginaw, in the state of Michigan, and offered to pay the freight charges whatever they might be, that would be an act of Interstate Commerce and under the constitution of the United States, Article 1, Sec. 8, Clause 3, the regulation of the terms upon which said goods would be received would be a regulation of Commerce between the states and the statute of North Carolina, Sec. 2631, in so far as it refers or applies to Interstate Commerce is in conflict with the Constitution of the United States and the laws pursuant thereto and the Jury are directed to answer the first issue, No. As the defendant now specially sets up and claims the benefit and protection of the Constitution of the United States and the laws passed under the authority of the same. (Not given.)

45 *Sixth Exception.*

Sixth. In this case the plaintiff must make out its case by a preponderance of the evidence and before plaintiff can require defendant company to receive the goods tendered for shipment from the State of North Carolina, to another state, the burden is upon the plaintiff to show by a preponderance of the evidence that the de-

fendant company has filed with the Interstate Commerce Commission rates from Burlington, N. C., to Saginaw, Mich., or that the defendant and connecting lines had established a through and joint rate, which said through and joint rate had been filed with the Interstate Commerce Commission, or that the defendant and several connecting carriers, if any, over which said freight would necessarily move, or could be moved, had established separate rates for that part of the Interstate journey over the said several lines; that said rates had been filed with the Interstate Commerce Commission long enough to be effective and that the same were in effect and the plaintiff having failed to offer such evidence the Court instructed the jury to answer the first issue, No. (Not given.)

Seventh Exception.

Seventh. The Jury in passing upon the question of whether there was rates established can consider the fact that the Agent stated that he did not know the rate and that the bill of lading was issued on 3rd day of April, 1907, for that under the laws of the United States a railroad company cannot issue a bill of lading for freight to move from one state to another or receive the freight rate thereon or freight charges until its rate shall have been filed with the
46 Interstate Commerce Commission for at least thirty days and published in the man-er prescribed by the laws of the United States. That there is no evidence in this case, that the said rate was not published as provided by law after application for said rate and it was the duty of the defendant company to hold the said goods that it received without delivering a bill of lading until a rate was published as required by law and then ship same, and the burden is upon the plaintiff to show that the said company failed and refused to receive said shipment after same was tendered after a rate had been filed and published in accordance with the provision of the laws of the United States, the benefit and protection of which this defendant now claims, and the Jury must answer the first issue no. (Not given.)

Eighth Exception.

Eighth. If the Jury find from the evidence that the plaintiff company delivered to the defendant company at Burlington, N. C., on or about the 28th day of Jan., 1907, certain milling machinery with instructions to ship at once to the Allison & Curtis Mfg. Company at Saginaw, Mich., and the defendant company received said goods at its warehouse or depot at Burlington, for shipment but failed to give plaintiff a bill of lading for same, then this would not be a violation of the laws of North Carolina set out in Sec. 2631, Revisal of 1905, and the Jury will answer the first issue, No. (Not given.)

Ninth Exception.

Ninth. If the Jury find from the evidence in this case that on or about 28th day of Jan., 1907, the plaintiff company delivered to

the defendant company at Burlington, N. C., certain milling
47 machinery with instructions to ship at once to the Allison & Curtis Mfg. Company at Saginaw, Mich., and the defendant company received said goods at its warehouse or depot at Burlington for shipment on 28th day of Jan., 1907, but at that time failed to give plaintiff a bill of lading for same, the defendant's agent at Burlington saying he did not know the freight rates on *on* said goods but would ascertain same and ship promptly to the above named party and look to the plaintiff for the freight charges, then there would be no such failure to receive as is contemplated by Sec. 2631 of the Revisal, and the Jury will answer the first issue, No. If the Court declines to give these instruction-, then the Court is asked to charge the Jury Sec. 2631 of the Revisal of 1805, as applied to a shipment of freight from Burlington, North Carolina, to Saginaw, Michigan, is in *is* conflict with the constitution of the United States and the laws of Congress passed pursuant to the authority invested in it and is unconstitutional and void, and the defendant now claims the benefit and protection of the constitution and laws of United States and asks the Court to hold said statute as unconstitutional and void. (Not given.)

Tenth Exception.

Tenth. If the Jury find from the evidence that on the 28th day of January, 1907, or thereabouts the plaintiff's agent delivered to the defendant company at Burlington, N. C., certain milling machinery and requested defendant's agent to ship same to the Allison & Curtis Mfg. Company at Saginaw, Mich., and plaintiff company then and there offered to pay the freight charges in advance and defendant company received said goods at its warehouse or
48 depot at Burlington, N. C., for shipment on 28th day of January, 1907, then and in that event the Jury will answer the first issue, No. (Not given.)

Eleventh Exception.

Eleventh. That before the plaintiff can recover any penalty the plaintiff must first show a distinct tender of the goods for each day for which he desires to recover a penalty and refusal to receive the goods for shipment on that day. The carrier's failure to issue bill of lading would not entitle the plaintiff to recover a penalty, nor will the delay in a shipment entitle plaintiff to receive penalty for failure to receive. There must be a demand that the company receive the shipment and the refusal to receive same for shipment. If the jury find there was only one tender of the goods for shipment and one refusal, then they would only give one penalty or one day, and in answer to the second issue the Jury will find such number of days as they may from the evidence find that there was a tender and a refusal on that date. (Modified and given.)

Twelfth Exception.

Twelfth. The laws of the United States require that a carrier shall upon reasonable request made by a party desiring to ship goods from one State to another establish a rate and file the same with the Interstate Commerce Commission and publish the same according to law, and shall upon a reasonable request furnish suitable facilities for such shipment. The Congress of the United States acting under the power vested in it under the Constitution of the United States to regulate Commerce, having enacted a law as to when and under what circumstances a carrier shall receive freight for
49 shipment from one State to another State, this law and the regulation so made excludes all State regulation, and if the Jury find from the evidence that the freight was tendered for shipment from North Carolina to Michigan, the carrier could only receive the same in accordance with the laws of the United States, and the Statute of the State of North Carolina could have no force, and you will answer the first issue, No. (Not given).

Thirteenth Exception.

Thirteenth. If the Jury find from the evidence that the goods when tendered were not suitably marked the Jury should answer the first issue, No. (Given).

Fourteenth Exception.

Fourteenth. If the jury find from the evidence that the goods in question were tendered for shipment from the State of North Carolina to the State of Michigan, the question of whether or not the defendant should receive them would be determined by the laws of the United States, and the Legislature of the State of North Carolina could not either impose a penalty for violating the laws of the United States, or determine when or under what conditions the defendant company should receive said goods for shipment, and the defendant claiming the benefit and protection of the Constitution and laws of the United States, the Court instructs you to answer the first issue, No. (Not given.)

Fifteenth Exception.

Fifteenth. If the jury find from the evidence in this case that the goods mentioned in the complaint were shipped to Burlington Lumber Company by Allison & Curtis of Saginaw, Michigan
50 on trial and that said property was being returned as not suitable, then you should answer the first issue. No. (Not given.)

Sixteenth Exception.

Sixteenth. I charge you to answer the first issue, No. (Not given.)

Seventeenth Exception.

Seventeenth. I charge that the burden is on plaintiff to show you that he is the owner of goods offered for shipment by a preponderance of the evidence. If it has not so done, you should answer the first issue, No. (Not given.)

Eighteenth. I charge you that any tender claimed to have been made by plaintiff must have been made in regular office hours of defendant at the office where tender is claimed as made and the burden is on plaintiff to show every tender for which it claims penalty as having been made during such hours. (Given.)

Nineteenth. I charge you that any tender claimed by plaintiff as having been made in this case to defendant at its Burlington office after five o'clock p. m. and before seven o'clock a. m. cannot be considered by you as the undisputed testimony in this case *is* the usual office hours of defendant at Burlington is from seven a. m. to five p. m. o'clock. (Given.)

PARKER & PARKER,
Att'ys for Deft.

The Court submitted issues as set out in the record and charged the jury as follows:

51 This is an action brought by the plaintiff against the defendant under Section 2631 of the Revisal, (The Court reads the Jury the above Section).

In this case the plaintiff alleges that it delivered certain goods — the defendant company for shipment from Burlington, N. C., to Saginaw, Mich., consigned to a firm by the name of Allison & Curtis, and that it was not received by the defendant company, by giving a B. L. and acknowledging receipt of it for transportation, and that it was delayed and that the defendant company unlawfully refused to receive it, and delivered a B. L. The plaintiff insists that the omission cover a period of sixty-one (61) days. Now the defendant denies these allegations and this puts the burden upon the plaintiff to prove its contentions by the greater weight of evidence on both of the issues submitted to you. Upon the pleadings the Court submits to you the following issues which were tendered to you by the defendant's attorney, and agreed to by the plaintiff's attorney.

1st Issue. Did the defendant company through its agent or officers refuse to receive for shipment certain milling machinery as named in the complaint?

Now in order to make out its case, the plaintiff must satisfy you by the greater weight of evidence that the particular machinery referred to in this complaint was tendered by it to the agent of the defendant company at the depot at Burlington, N. C., as alleged or

at the warehouse or on the siding of the defendant company at Burlington, N. C. It must satisfy you that the plaintiff in this case was the owner of the property and if not absolutely the owner of the property that it had such control over the property and interest in the property as give it a right to demand of the defendant company the shipment of the property and that it would be aggrieved and injured, if the property was not shipped when tendered to the defendant, if it did tender it, and it is necessary for it to show an actual tender, and at a period of time when it was reasonable for the defendant to have an agent there at its depot for the purpose of receiving it, and if it was a reasonable time, between the hours of 7 A. M. in the morning and 5 P. M. in the evening, then it should have tendered the property at sometime between those hours.

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The plaintiff insists that this property was carried there by an agent of the plaintiff, or caused to be carried there by the plaintiff and that the agent of the plaintiff appeared thereon the evening of the 28th day of January and offered to turn over this property for shipment over the defendant company's line and the plaintiff also contends that it was unloaded there the evening of the 28th day of Jan. and the agent of the defendant company not being there, plaintiff's agent afterwards returned on the next day and had a conversation with the agent of the defendant company in regard to this shipment of this property. That the agent of the defendant stated that he did not know what the rates were between Burlington and Saginaw, Mich., and told him that he would find out. That the evidence shows that Wilson, the agent of the plaintiff, did return and had conversation with the agent of the defendant company from time to time in regard to this shipment and demanded that the shipment be made. That Wilson, the agent for the plaintiff also says that there were tags on the property indicating where it was to be shipped, from whom and to whom, and also place where it was to be shipped.

The plaintiff insists that all the directions with the name of Consignor and name of Consignee and place of destination were given and that these demands were made from time to time, that the shipment should have been made, but that the shipment was not made because of the failure of the defendant to furnish the agent at Burlington, N. C., the rate to be charged from Burlington, N. C., to Saginaw, Mich., so that he could make out the B. L. and send the property to the proper destination.

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"A." Plaintiff insists that you should find from the greater weight of evidence that this property was the property of the plaintiff and if it was not absolutely the owner of the property that it had such interest in the property as to have the right to demand the shipment of it and if it had not shipped same it would have incurred the loss for non-shipment of it. "B."

"C." It also insists that you will find from the evidence that it was under obligation to send this back by way of exchange between itself and Consignee and could not effect this arrangment until the goods were shipped. "D."

The plaintiff contends from the evidence that it was deprived of the privilege of having that done by reason of negligence and delay for sixty-one (61) days by the defendant company.

In regard to that question whether or not a person has such an interest that it may be aggrieved or not aggrieved in the demand for making shipment of good-, I state to you in the language of the Court above:

Court reading from the decision:

"E." "In giving the penalty to the party aggrieved the statute simply designates the person who shall have a right to sue and restricts it to him who by contract has acquired the right to demand that the service be rendered." (138-298) "F."

54 "G." If the plaintiff demanded the shipment and the shipment was not made, then it will be for plaintiff to show whether or not plaintiff suffered loss, if this shipment not made. That idea was conveyed to you very clearly in the argument of the last counsel, Mr. Parker, for the defendant company. Has the plaintiff satisfied you that it is within such meaning of the statute and the definition I have given you and would be damaged if the property was shipped or not. "H."

Has the plaintiff satisfied you that it was actually delivered to the defendant and that it was shipped in sixty-one or any other number of days and that there was a refusal to give B. L. for it, as was insisted upon by the plaintiff?

"I." The Court instructs you that if the plaintiff was the owner of this property or had such an interest in it as to have had a right to ship it or to actually make a tender of it to the defendant and that the defendant ought to have given them B. L. (that is to say if the goods were such goods as were contemplated that should be shipped; and I have heard no evidence that it was not such goods as could not have been shipped) then the defendant company should have issued a B. L. to the plaintiff company and that would have been an acceptance. "J."

However, the defendant in this case insists, gentlemen, that the plaintiff here is really not the party that owned these goods, and you should so find from certain portions of the evidence which have been read in your hearing, and that the property was owned by a firm in Saginaw, Michigan, and that this party is the one aggrieved, if any one is aggrieved, by reason of the delay in the shipment, and the evidence that is given by Mr. Wilson, agent for the plaintiff, brought out upon cross examination by the defendant company as to

55 what Mr. Wilson told the agent of defendant about the matter; this has also been read over to you twice, gentlemen, it is not necessary for me to repeat it to you.

The defendant's counsel asked me to give you certain instructions, some of them I refuse, some I give, those I give are as follows:

Eleventh. That before the plaintiff can recover any penalty the plaintiff must first show a distinct tender of the goods for each day for which he desires to recover a penalty and refusal to receive the goods for shipment on that day. There must be a demand that the company receive the shipment and the refusal to receive the same

for shipment. If the Jury find there was only one tender of the goods for shipment, and one refusal, then they would only give one penalty or one day, and in answer to the second issue the Jury will find such number of days as they may from the evidence find that the goods were tendered, and a refusal on that date.

Thirteenth. If the Jury find from the evidence that the goods when tendered were not suitably marked, the Jury should answer the first issue, No.

The statute requires that the consignor when he delivers or tenders goods to be shipped, shall give name of consignee and point of destination, otherwise shipper would not know to whom to send or where to send. I leave that question with you to pass upon it. The plaintiff insists that it gave name of shipper and place from the evidence of Mr. Wilson.

I believe the counsel of the defendant insists that there was no tender made on the 28th day of January or three days after at least;
56 and that through and from the evidence of Mr. Wilson it contends that he came there on the 28th of Jan. with the goods and that the agent was not there, and that later he came and gave him the name of the consignee, point of destination and that the goods were marked, and that arrangements were made for shipment to be made, when rate was made. I leave you to pass on the facts and I give you these instructions to be applied to the facts as you shall find them from the evidence.

Fifteenth. The defendant asks me to give you these instructions: "If the Jury find from the evidence in this case that these goods mentioned in the complaint were shipped to the Burlington Lumber Co. by Allison & Curtis or some firm in Michigan or the town of Saginaw, Mich., on trial and if said property was being returned as not suitable, then you should answer the first issue, "No."

The Court does not give you this instruction in the language in which it is prayed, but the Court calls your attention to the instructions which have heretofore been given you in regard to the ownership of the property and in regard to what interest the plaintiff should have in the property, in order to be an aggrieved person who could bring an action within the meaning of this statute.

"K." In giving the penalty to the party aggrieved, the statute simply designates the person who shall have a right to sue and restricts it to him who by contract has acquired the right to demand that the service be rendered and plaintiff must have such interest as that he has a right to demand and require of the defendant company to make shipment of it, and if such demand is made by it and is not granted by the defendant company and a loss and injury is caused by failure to ship as requested, then the penalty accrues.

"L."

57 Seventeenth. The defendant asks me to charge you as follows: "I charge you that the burden is on the plaintiff to show you that he is owner of the goods offered for shipment by a preponderance of the evidence. If it has not done so, you should answer to the first issue "No."

(The Court gives you these instructions qualified by the instruc-

tion heretofore given as to what control and interest plaintiff should have to enable it to have right to demand shipment.)

Eighteenth. The defendant requests me to give you this instruction: "I charge you that any tender claimed to have been made by plaintiff must have been made in regular office hours of defendant at the office where the tender is claimed as made, and the burden is on the plaintiff to show ever- tender for which it claims penalty, as having been made during such hours."

(The Court gives you this instruction.)

Nineteenth. Defendant asks me to give you this instruction: "I charge you that any tender claimed by the plaintiff as having been made in this case to the defendant at its Burlington office after 5 o'clock P. M. and before 7 o'clock A. M. cannot be considered by you, as the undisputed testimony in this case is that the usual office hours of the defendant at Burlington is from 7 A. M. to 5 P. M.

(The Court does not give you this instruction in the exact language in which it is asked, because it requires me to express an opinion as to the facts, but the Court qualifies it in this respect; that if upon the review of the evidence you find that the regular office hours embraced the time referred to in these instructions, then the rule of the law is given you as asked in these instructions, if
58 you find the facts so to be from the evidence applied. I know, gentlemen, you will review all of this testimony and after you have reviewed it you will please answer this first issue upon the review of this testimony, applying the law as I have given it to you, if you find in favor of the plaintiff your answer to this first issue will be "Yes." If you answer in favor of the defendant your answer to this first issue will be "No." If you answer the first issue "No" you need not answer the second; that will be the end of the case. If you answer the first issue "Yes" then you will come to pass upon the second issue, which is as follows:

Second issue. "If so, for how many days did the defendant company or its officers or agent so fail and refuse to receive said goods for shipment?"

The burden is on the plaintiff as to this issue to satisfy you by the greater weight of evidence as to its contentions in regard to this. The plaintiff insists that this refusal was made from time to time over a period of from sixty to sixty-one days.

The defendant insists that there was not a refusal of near so many days. Defendant insists that there was not a refusal in any event over one day. So that as to this issue you will review all of the testimony and report the number of days you may find, if you find that there was refusal, as contemplated by this issue on the part of the defendant.

Before the issues are handed to the Jury to be passed upon, the Court asked both sides if they desired the Stenographer's notes of the testimony read to the Jury and the counsel on both sides expressly waived same.

The Instructions prayed by the defendant were refused,
59 except those given and set out — the Court's instructions, to-wit:

Eleventh, modified.
Thirteenth, given and modified.
Fifteenth, given and modified.
Seventeenth, given.
Eighteenth, given.
Nineteenth, Given and modified.

Eighteenth Exception.

To the action of His Honor in charging the Jury as shown by the charge set out as contained in the paragraph from "A" to "B."
(The defendant objects. Objection overruled and defendant excepts.)

Nineteenth Exception.

To the action of His Honor in charging the Jury as shown by the charge set out as contained in the paragraphs from "C" to "D."
(The defendant objects. Objection overruled and defendant excepts.

Twentieth Exception.

To the action of His Honor in charging the Jury as shown by the charge set out in the paragraph from "E" to "F."
(The defendant objects. Objection overruled and defendant excepts.)

Twenty-First Exception.

To the action of His Honor in charging the Jury as shown by the charge set out as contained in the paragraph from "G" to "H."
60 (The defendant objects. Objection overruled and defendant excepts.)

Twenty-Second Exception.

To the action of His Honor in charging the Jury as shown by the charge set out as contained in the paragraph from "I" to "J."
(The defendant objects. Objection overruled and defendant excepts.

Twenty-Third Exception.

To the action of His Honor in charging the Jury as shown by the charge set out as contained in paragraph from "K" to "L."
(The defendant objects. Objection overruled and defendant excepts.)

The defendant assigns errors as follows:
1st Exception. To the action of the trial Judge in permitting plaintiff to ask and witness, Wilson, to answer question as follows:

"State whether or not on or about the 28th of January, 1907, did you deliver any machinery to the Southern Railway Company for shipment?" (Answer) "Yes sir."

2nd Exception. To the failure of His Honor to give the defendant's first prayer for instruction.

3rd Exception. To the failure of His Honor to give the defendant's second prayer for instruction.

61 4th Exception. To the failure of His Honor to give the defendant's third prayer for instruction.

5th Exception. To the failure of His Honor to give the defendant's fourth prayer for instruction.

6th Exception. To the failure of His Honor to give the defendant's fifth prayer for instruction.

7th Exception. To the failure of His Honor to give the defendant's sixth prayer for instruction.

8th Exception. To the failure of His Honor to give the defendant's seventh prayer for instruction.

9th Exception. To the failure of His Honor to give the defendant's eighth prayer for instruction.

10th Exception. To the failure of His Honor to give defendant's ninth prayer for instruction.

11th Exception. To the failure of His Honor to give defendant's tenth prayer for instruction.

12th Exception. To the action of His Honor in modifying defendant's eleventh prayer for instruction.

13th Exception. To the failure of His Honor to give defendant's twelfth prayer for instruction.

62 14th Exception. To the failure of His Honor to give defendant's fourteenth prayer for instruction.

15th Exception. To the failure of His Honor to give defendant's fifteenth prayer for instruction.

16th Exception. To the failure of His Honor to give defendant's sixteenth prayer for instruction.

17th Exception. To the failure of His Honor to give defendant's seventeenth prayer for instruction.

18th Exception. To the action of His Honor in charging the jury as shown in the charge given between the letters "A" to "B" as follows:

"Plaintiff insists that you find from the greater weight of evidence that this property was the property of the plaintiff and if it was not absolutely the owner of the property that it had such interest in the property as to have the right to demand the shipment of it and if it had not shipped same it would have incurred the loss for non-shipment of it.

19th Exception. To the action of His Honor in charging the Jury as shown by the charge set out as contained in the paragraph from "C" to "D" as follows:

"It also insists that you will find from the evidence that it was under obligation to send this back by way of exchange between itself and Consignee and could not effect this arrangement until goods were shipped."

63 20th Exception. To the action of His Honor in charging the Jury as shown by the charge set out as contained in the paragraph from "E" to "F" as follows:

"In giving the penalty to the party aggrieved the statute simply designates the person who shall have a right to sue and restricts it to him who by contract has acquired the right to demand that the service be rendered." (138-298.)

21st Exception. To the action of His Honor in charging the Jury as shown by the charge set out as contained in the paragraph from "G" to "H" as follows:

"If the plaintiff demanded the shipment and the shipment was not made, then it will be for plaintiff to show whether or not plaintiff suffered loss, if this shipment was not made. That idea was conveyed to you very clearly in the argument of the last counsel, Mr. Parker, for the defendant company. Has the plaintiff satisfied you that it is within such meaning of the statute and the definition I have given you and would be damaged if the property was shipped or not."

22nd Exception. To the action of His Honor in charging the Jury as shown by the charge as set out as contained in the paragraph from "I" to "J" as follows:

The Court instructs you that if the plaintiff was the owner of this property or had such an interest in it as to have had a right to ship it or to actually make a tender of it to the defendant and that the defendant ought to have given it B. L. (that is to say if the goods were such goods as were contemplated that should be shipped; and

64 I have heard no evidence that it was not such goods as could have been shipped) then the defendant company should have issued a B. L. to the plaintiff company and that would have been an acceptance.

23rd Exception. To the action of His Honor in charging the Jury as shown by the charge set out as contained in the paragraph from "K" to "L" as follows:

"In giving the penalty to the party aggrieved, the statute simply designates the person who shall have a right to sue and restricts it to him who by contract has acquired the right to demand that the service be rendered and plaintiff must have such interest as that he has a right to demand and require of the defendant company to make shipment of it, and if such demand is made by it and is not granted by the defendant company and a loss and injury is caused by failure to ship as requested, then the penalty accrues."

The Clerk will send up as the record, the summons, pleading, Jury's verdict, judgment, all entries from his minute docket and this statement of case on appeal as constituting the case on appeal.

PARKER & PARKER,
For Defendant.

The foregoing Statement of Case on Appeal is approved. This July 12th, 1909.

W. H. CARROLL,
Att'y for Plaintiff.

The foregoing is endorsed as follows: Defendant's Case on Appeal. Filed July 12, 1909. J. D. Kernodle, C. S. C. Service of case accepted this July 12th, 1909. W. H. Carroll, Att'y for Pl'ff.

65 STATE OF NORTH CAROLINA,
Alamance County:

I, J. D. Kernodle, Clerk of the Superior Court of Alamance County, State of North Carolina, do hereby certify that the foregoing is a full, true and perfect transcript of the record in a civil action pending in said Court, wherein Burlington Lumber Company is plaintiff and Southern Railway Company is defendant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Graham, on this the 30th day of August, 1909.

[SEAL.] J. D. KERNODLE,
Clerk of the Superior Court of Alamance Co.

[Docket entries. Appeal docketed Oct. 9th 1909—Argued Oct. 29: Advisari: Opinion handed down March 2, 1910 by Clark, C. J. for the court: Brown and Walker JJ. dissenting.]

66 Supreme Court of North Carolina, August Term, 1909.

No. 318.

BURLINGTON LUMBER COMPANY
vs.
SOUTHERN RAILWAY COMPANY, Appellant.

Alamance County.

Appeal from Long, J., at May Term, 1909, of Alamance.

The plaintiff sought to recover the penalty prescribed by Revisal 2631 for the refusal of the defendant to receive for shipment to Saginaw, Michigan, certain milling machinery tendered it by the plaintiff on 28 January, 1907, no bill of lading for said machinery being issued until April 3, 1907.

The plaintiff's contention was that the defendant failed and refused to receive said machinery for shipment upon tenders made daily and continuously for a period of sixty-five days, and that by reason of said refusal said defendant became indebted to the plaintiff in the sum of $3,050.00, all of this amount in excess of $2,000.00 being remitted by the plaintiff. The defendant denied that there was any tender of machinery for shipment until April 3, 1907, the day on which bill of lading was issued. It alleged that Revisal 2631 was unconstitutional, in so far as it affected interstate shipments. It also alleged that the plaintiff had no such interest in the said machinery as entitled it to bring this action. There was a

verdict for the plaintiff and a judgment in accordance therewith, from which defendant appealed.

W. H. Carroll, for plaintiff;

W. B. Rodman and Parker & Parker, for defendant.

CLARK, *C. J.*:

The exceptions 1, 2 and 12 are for failure to give certain prayers for instruction. On examination we find they were given substantially in the charge, which is sufficient. Harris v. R. R. 132 N. C. 163; R. R. v. Horst, 93 U. S. 201.

67 Exceptions 4, 5, 6 and 7 are for refusal to give defendant's prayers for instruction, 3, 4, 6 and 7, which are in substance that this being an interstate shipment, the defendant was required to establish, file and publish its rate between Burlington, N. C. and Saginaw, Mich. before shipping this freight and that the burden was on the plaintiff to show that the rate had been so filed. The duty to file such rate was on the defendant, the fact was in its peculiar knowledge, and its failure to show that it had discharged such duty cannot absolve it from its duty to the plaintiff, to accept and ship his freight. It cannot plead its own default as a defense to another default. Indeed on April 3, the agent at Burlington did get such rate from division headquarters at Greensboro—21 miles away. There is no evidence that such rate could not have been procured at any time prior thereto.

The court committed no error in refusing *there* prayers for instruction. The proper establishing publication and filing rates will be conclusively presumed. In Reid v. R. R. 150 N. C. 764, the court in passing upon the same contention said:

"The presumption is that the Company has complied with the law, and if it were otherwise, we are of the opinion that the Act of Congress and the orders of the Commission made thereunder, requiring the publication of rates, was made for an entirely different purpose from that involved in this inquiry, and does not constitute such interfering action."

To same purport, R. R. v. Oil Mills, 204 U. S. 449.

In Harrill v. Railroad, 144 N. C. 540, the Court says:

"It must be presumed against the contention of the defendant that it has complied with the law by filing its schedule of rates, fares and charges with the Commission and by publishing the same."

The Federal statute does not prohibit the receipt or forwarding of a single shipment, but forbids the carrier to "engage or participate in the transportation of passengers or property" interstate, without filing its rates. It is the business of a common carrier which the defendant is forbidden to exercise, without filing its rates and the statute has no sort of application to this case, where the defendant was carrying on such business and presumptively, at least, under authority of law.

68 Exceptions 6, 13, 14 and 16 call in question the constitutionality of Rev. 2631 as applied to interstate shipments. We have repeatedly passed upon this contention. The defendant's brief admits this and cites eight decisions of this court, which it asks us

to overrule. In one of the latest of these, Reid v. R. R. 149 N. C. 424, the authorities were reviewed and the court said:

"The defendant contends, however, that Revisal, Section 2631, giving a penalty for refusing to accept freight for shipment is unconstitutional when the freight is to be shipped into another State, but refusing to receive for shipment is an act wholly done within this State; it is not a part of the act of transportation, and our penalty statute applied."

This was held in Avery, J. in Bagg v. Railroad, 199 N. C. 729, where the railroad Company received the shipment for a point in another state, but negligently detained it for five days before shipping. The precise point herein was raised in Currie v. Railroad, 138 N. C. 536, and it was held that this action, giving a penalty for failing and refusing to accept for shipment the carload of lumber, was not unconstitutional as an interference with Interstate Commerce, when the lumber was offered for shipment to a point in another state. Both of these cases were cited and reaffirmed by Walker, J. in Walker v. Railroad, 137 N. C. at page 168. In Twitty v. Railroad, 141 N. C. 355, it was held, Brown, J. that where the agent held the freight in storage, but refused to give a bill of lading, because he did not know the freight rates, this was a refusal to receive for transportation and the railroad company was liable for a penalty under Revisal 2631. In Harrill v. Railroad, 144 N. C. 532, Walker, J. it was held that Revisal, Section 2633, imposing a penalty for failure to deliver freight, was valid, though the freight was interstate. There the penalty was incurred after the transportation had ceased. Here the penalty occurred before the transportation had been begun and before the freight was even received and accepted for transportation.

When the case was again before the court, Reid v. R. R. 150 N. C. 764, Justice Hoke, after reviewing and approving the former decision said:

69 "Since this decision of the Morris-Scarborough-Moffit Company v. Express Company was rendered, the Supreme Court of the United States, the final authority on these matters, has held on a question relevant to this inquiry that 'Notwithstanding the creation of Interstate Commerce Commission, and the delegation to it by Congress of the control of certain matters, the State may in the absence of express action by Congress or by such commission, regulate for the benefit of its citizens, local matters indirectly affecting interstate commerce. This principle was announced and sustained in Railroad v. Flour Mill, 211 U. S. 612, a case which involved the right of the Court to compel the Railroad Company or common carrier to place cars on a siding, which had been prepared for the purpose and for the benefit and convenience of a flouring mill, engaged in making shipments of Interstate Commerce."

The above decisions have been since followed by Connor, J. 150 N. C. 575, 592, with full review of the authorities and no dissent. In fact the duty to receive freight "whenever tendered" was a common law duty; Alsop v. Express Co., 104, N. C. 278; cited and approved in Garrison v. R. R. supra 582.

That the interstate commerce did not begin till the goods were accepted for shipment and bill of lading issued, is held, Match Co. v. Ontonagon, 188 U. S. 94, citing Coe v. Errol, 116 U. S. 517, where Bradley, J. held that,—"not till goods have begun to be transported from one State to another, do they become the subjects of interstate commerce and as such, subject to federal regulation." In this opinion (p. 528) he says—

"It is true, it was said in the case of Daniel Ball 10 Wall. 565, 'Whenever a commodity has begun to move as an article of trade, from one State to another, commerce in that commodity has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. . . . Until shipped or started on its final journey out of the State, its exportation is a matter altogether in fieri, and not at all a fixed and certain thing."

Besides, the statutory enforcement, under penalty, of the common law duty to accept freight "whenever tendered" is not in the scope or terms of any act of Congress, and is neither an interference with, nor a burden upon interstate commerce, but in aid of it.

Exceptions 9, 10 and 11 are for refusal of prayers based on the theory that the goods were accepted for shipment 28 Jan. 1907 which is not supported by evidence and were properly refused. Hassard-Short v. Hardison, 117 N. C. 60.

70 Exceptions 17, 18, 19, 20, 21, 22 and 23 present only one question, and may, therefore be treated together. Did the plaintiff have the right to bring this action? Was he the aggrieved party? The law is correctly set forth in the following citations:

"The shipper of the goods is the party aggrieved and is the one entitled to sue for the penalty prescribed in Revisal, Section 2631, which arises from the wrongful refusal of the carrier's agent to accept them for transportation."

Reid v. Railroad, 149 N. C. 423; S. C. 150 N. C. 753.

"In giving the penalty to the party aggrieved, the statute simply designates the person who has the right to sue and restricts it to him, who by contract has acquired the right to demand that the service be rendered. The party aggrieved in statutes of this character, is the one whose legal right is denied, and the penalty is enforcible independent of pecuniary injury."

Rollins v. R. R., 146 N. C. 156.
Cardwell v. R. R. Ib. 218;
Sumers v. R. R. 138 N. C. 295.

This machinery had been shipped to the plaintiff on approval, and as it proved unsatisfactory, it was the plaintiff's duty, if it would relieve itself of liability, to return it to the vendors at Saginaw, Mich. and it had the legal right to demand of the defendant its transportation to that point, and was the party aggrieved by failure to do so.

At the last term, Connor, J. speaking for a unanimous court, said, in Garrison v. Railroad, 150 N. C. 586,—

"The defendant next urges that the penalty of $50.00 for each day

the said company refuses to receive said shipment—can be recovered only when a tender is made on each day. We cannot concur in that view. The plaintiff hauled his lumber to the defendant's regular depot and with his consent placed it upon the car (in this case, in its depot) demanding a bill of lading, which was refused. Plaintiff said he went to the agent two or three times and asked if he had shipped it and he said he had not. . . . To require the plaintiff to haul the lumber home and return it to the depot each day, or to go through the empty form of making a constructive tender, imposes either an unwarranted hardship or savors of trifling with a man's substantial rights. The plaintiff left the lumber on the car with a standing tender and demand that it be shipped. . . . The statute would be of little value as a remedy for an existing evil, if the narrow construction is given as contended by defendant. The legislature evidently intended to impose a penalty for each day upon which the freight was at the depot ready for shipment. Each day's delay in shipping was a refusal to ship within the meaning of the statute."

71 The verdict of the jury established that the defendant failed and refused for sixty-one days to receive said goods for shipment. The plaintiff remitted all in excess of the penalty for forty days.

If the defendant had offered to ship to end of its line, and declined to ship further for lack of rates, a different point might have been presented, but there is no such exception in the record or in appellant's brief, and more than one of defendant's prayers is predicated on its refusal to issue any bill of lading, because the agent at Burlington did not have the rates to Saginaw, though he had applied to the agent at Greensboro for them. But the neglect of the agent at Greensboro, or those "higher up" was the failure and default of the defendant. Besides, if the defendant had issued the bill of lading, it is common knowledge, that it would have contained the words "said company agrees to carry to its usual place of delivery, if on its road, otherwise to deliver to another carrier on the route to said destination."

These words, always used in such cases, are retained in the bill of lading prescribed by the Interstate Commerce Commission. The plaintiff asked for no other kind of bill of lading and could not have expected the defendant to be responsible for shipment beyond the end of its own line. The defendant refused to issue any bill of lading at all (which would have been, of course, in the usual form for such shipments) or to ship at all, and the defendant is liable. Twitty v. R. R. 141 N. C. 355, in which the opinion is by Brown, J., is exactly in point.

Affirmed.

72 No. 318, Alamance.

BURLINGTON LUMBER COMPANY
vs.
SOUTHERN RAILWAY COMPANY, Appellant.

BROWN, *J.*, dissenting:

The facts appearing from the plaintiff's evidence are as follows.

On Jan. 28, 1907, plaintiff delivered to defendant at its depot in Burlington, North Carolina, one blow pipe machine, with directions to ship it to Allison & Curtis Manufacturing Co. Saginaw, Michigan. The blow pipe was not the property of the plaintiff, but had been sent on trial and was being return- to the owners. The defendant's agent stated that he had no rates on Saginaw, Mich. and could not ship the blow pipe until he could get them. Plaintiff's agent said that was all right, that he would pay freight as soon as he got bill of lading. The blow pipe was placed on the platform of defendant's depot. Defendant's agent tried to get the rates next day from the Division Freight Agent's office at Greensboro, but did not succeed in getting them until April 1, 1907, and two days thereafter, the bill of lading was issued and the pipes were shipped.

The plaintiff claimed an indebtedness by way of penalty for $3,050.00 under the statute of this State, Revisal 1905, Sec. 2631, but did not make a claim for any actual damage sustained by the delay. Whether from motives of benevolence, fearing that such drastic penalties in a transaction of such small value, will bankrupt the defendant, or whether from fear of removal to the Federal Courts, for some reason, the plaintiff demands judgment for only $2000.00.

1. I am of the opinion that under the language and spirit of the statute, the plaintiff is not the party aggrieved and, therefore, can not maintain this action. It is admitted by plaintiff's witness that the goods were not plaintiff's property, but the property of the Allison Curtis Co., of Saginaw, Mich., that they had been sent out for examination and were being returned.

73 In returning the pipes, the title to which had never been in plaintiff, the clerk of plaintiff was acting for the Allison Co. If the defendant is liable at all, for penalty, it is liable to the Allison Co., for that company alone has sustained any actual damage by delay. The statute plainly designates who is the party aggrieved by coupling him with the one who has sustained actual damage, in these words: "and shall pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive the freight."

This language is peculiar to this statute, and does not appear in the other penalty laws. Unless the plaintiff can recover actual damages incident to the delay, then it follows that the penalty must go to the party who has sustained them. In this case, it is admitted that it is the consignee, who owned the property, and to whom it was being returned, and who alone could be endamaged in any way by the

delay. It follows that the consignee alone can sue for the penalty. This is the principle laid down by this Court in Stone v. R. R. 144 N. C. 220, and as late as last term of this Court by Mr. Justice Walker, in McRacken v. R. R. 150 N. C. 332.

It is plain to me that the General Assembly has not subjected the defendant to two penalties,—one to consignor, and one to consignee, but by the express language of the Act, has given the one penalty to the party who has sustained actual damage. It is therefore, manifest that a judgment against defendant in this action would be no bar to a recovery by the Allison-Curtis Co. for actual damages and for this same penalty in connection therewith.

2. I am of the opinion that this transaction is one of interstate commerce, to which Sec. 2631 of our Revisal can not apply. This is especially true since the Act of Congress of June 29, 1906, 34 Stat. L. 584, by which Congress has extended its jurisdiction over the whole subject of interstate shipments and ousted that of the States, if they ever had any, to regulate or to penalize carriers in respect to such shipments. This exact question is discussed in the dissenting opinion concurred in by Justice Walker and myself, in Reid v.
74 R. R. 150 N. C. 766, in which I cited R. R. v. Mays, 201 U. S. 321, as direct authority against the right of a State to penalize a transaction of this kind, upon the ground that it is an attempt o regulate and impose a burden upon interstate commerce.

It would seem to me that a statute which permits the recovery as penalty of over $3000 in a small transaction by a party who has sustained no loss and claims no actual damage, does impose an unreasonable burden upon interstate, or any other kind of commerce, which few common carriers can bear and still perform their duties to the public.

It appears to me to be immaterial upon whom rests the burden of proving that defendant's schedules had not been filed and published in accordance with the Act of Congress. The Act is cited for the purpose of showing that by its regulations and requirements, Congress has itself assumed exclusive control of this kind of commerce, and this ousted that of the States. If it is material then it appears from plaintiff's testimony (defendant offered none) that defendant Company had no rates to Saginaw, Mich. and, presumably, had filed and published none, as Saginaw is not on defendant's lines. There are many lines of railway, belonging to different carriers, between Burlington and Saginaw, and surely the burden of proof can not rest on this defendant, to show that these several carriers had not filed and published their rates in accordance with the Act.

3. There is another stronger reason which impels me to believe that the General Assembly never intended the statute to apply to a transaction of this kind. Before this plaintiff can recover the penalty, it must show that the defendant was under a legal obligation to accept the pipes for transmission to Saginaw, Mich. and to give a bill of lading to that point. It is universally held in this country that a common carrier can not be compelled to accept freight for shipment and delivery to a point beyond its own lines. It may voluntarily contract to do so, but it can not be compelled by any legislative

authority. Hutchinson on Carrier, Sec. 145, and cases cited in notes.

75 As said in the dissenting opinion, referred to in Reid vs. R. R. supra:

"The liability of the carrier beyond the terminus of its own line must be based on contract, and no authority has been shown, and none exists, so far as my researches have discovered, to the effect that a State can compel an interstate carrier to enter into such a contract and give a through bill of lading to points in another State, beyond its own lines, and penalize the carrier for its refusal."

It is not to be supposed that the Legislature of this State intended to impose a penalty upon a commons carrier for refusing to enter into a contract of carriage which it had no power to compel it to enter into. This principle of law practically recognized in the opinion of the Court in Reid v. R. R. supra p. 765, but the Court held that Scottville, Tenn. was on defendant's line of Railway, according to the evidence in that case. In this respect that case differs materially from this, for it is matter of common knowledge of which courts may take judicial notice, that the Southern Ry. Co.'s lines do not extend anywhere near to the State of Michigan. Harper vs. Sou. Express Co. 144 Page 639.

Therefore, I take it to be undeniable that when the plaintiff tendered the pipes to defendant's agent at Burlington, N. C. and demanded a bill of lading to Saginaw, Mich. the agent had a right to refuse the proffered shipment, altogether, unless the shipper should signify that he desired a bill of lading to the nearest point on defendant's own line of railway, which in this case, was not done. Giving the desired bill of lading to Saginaw, was a matter of private contract, and the refusal to do so was not a violation of any public duty, which the defendant owed the plaintiff. Therefore, defendant's agent acted well within his rights, when he refused to give a bill of lading, and thus enter into a written contract to deliver the goods at Saginaw, until, through the traffic department of the defendant, joint rates with the other carriers had been arranged.

It is a matter of general knowledge that transportation rates all over the United States are being constantly changed, and it is impossible for any common carrier to keep track of the various

76 rates to every railroad station in this Union, and to be able at once to give them on demand. Under such circumstances, they have, in my opinion, the right to refuse such shipments altogether, or to hold up the issue of bills of lading until the necessary inquiries are made. This court has held that a refusal to issue a bill of lading at once, upon tender of the freight to the point named by the shipper, is a refusal to receive, and brings down upon the carrier the penalty given, Sec. 2631.

This action is brought to recover the penalty for refusal to issue the bill of lading, to Saginaw, and not for a delay in shipping the goods after receipt, and, under the opinion of the majority, the plaintiff, if he had asked it, would be entitled to recover fifty dollars per day from Jan. 28, when the bill of lading was demanded to Apr. 3, when it was issued, although this contract was one which it must

be admitted, the State of North Carolina had no power to compel the defendant to enter into.

I am unable to reconcile such decision with the well settled principles of law to which I have adverted.

Mr. Justice Walker concurs in this dissenting opinion.

77 (Title of Cause.)

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Alamance County. Upon consideration whereof this court is of opinion that there is no error in the record and proceedings of said Superior Court. It is therefore considered and adjudged by the court here that the opinion of the court as delivered by the Honorable Walter Clark, Chief Justice be certified to the said Superior Court to the intent that the judgment be affirmed. And it is considered and adjudged further that the defendant and surety do pay the costs of the appeal in this court incurred, to-wit, the sum of Thirteen 25/100 Dollars ($13.25) and execution issue therefor.

Certificate.

I, Thos. S. Kenan, Clerk of the Supreme Court of North Carolina do certify the foregoing to be a full, true and perfect copy of the record on file in this court in the case of the Burlington Lumber Company v. The Southern Railway Company.

Given under my hand and seal of said court on this the 19th day of March, 1910 at office in Raleigh.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk Supreme Court N. C.

Endorsed on cover: File No. 22,076. North Carolina Supreme Court. Term No. 236. Southern Railway Company, plaintiff in error, vs. Burlington Lumber Company. Filed March 24th, 1910. File No. 22,076.

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Supreme Court, U. S.
FILED.
APR 23 1912
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 236.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

BURLINGTON LUMBER COMPANY,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN K. GRAVES,
Attorney for Plaintiff in Error.

ALFRED P. THOM,
Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 236.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

BURLINGTON LUMBER COMPANY,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Burlington Lumber Company, defendant in error, on April 15, 1907, instituted an action in the Superior Court of Alamance County, North Carolina, against Southern Railway Company to recover penalties for the failure and refusal of said Southern Railway Company, on dates from January 28 to April 3, 1907, to receive and issue a

bill of lading for goods tendered to it by Burlington Lumber Company, defendant in error, at Burlington, North Carolina, for transportation to Saginaw, Michigan, said penalties being claimed by virtue of the provisions of a statute of North Carolina, being section 2631 of the North Carolina Revisal of 1905. Judgment was rendered in said Superior Court in favor of the defendant in error, Burlington Lumber Company, for $2,000.00, with interest, against Southern Railway Company, which judgment was on appeal affirmed by the Supreme Court of North Carolina.

The case was brought here by Southern Railway Company claiming that the statute of North Carolina upon which said judgment was based is, as applied to interstate commerce, in connection with which this cause arose, in contravention of the Constitution of the United States and of the laws of Congress enacted in pursuance thereof.

The North Carolina statute is as follows:

> "Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a side-track, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under

existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or workhouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment."

Code of North Carolina, 1905, sec. 2631.

The evidence, which will be found at pages 15-22, inclusive, of the transcript, shows the following facts:

On the 28th or 29th day of January, 1907, defendant in error, Burlington Lumber Company, tendered to the agent of plaintiff in error, Southern Railway Company, at its freight depot at Burlington, North Carolina, certain machinery for shipment to Allison & Curtis Manufacturing Company, at Saginaw, Michigan, offering to prepay the freight charges and demanding a bill of lading to destination (Trans., pp. 15, 16, 17, 20). The agent of plaintiff in error said he did not have the rate, but that when he should find out the rate he would issue the bill of lading as requested (Trans., pp. 16, 20). Plaintiff in error's agent applied to his superior to ascertain the rate on January 29 and several times thereafter (Trans.,

pp. 20, 21). The Lumber Company's agent made a number of inquiries of the railroad agent as to the shipment of machinery, and on April 3, 1907, the carrier's agent ascertained the rate and on the same date issued a prepaid through bill of lading as requested (Trans., pp. 16, 19, 20).

The machinery was the property of Allison & Curtis Manufacturing Company, Saginaw, Michigan, having been sent on approval to defendant in error, and was being returned to the owner (Trans., pp. 18, 22). The complaint (Trans., p. 9) demanded only the penalties under the statute, no actual damage being claimed or proved.

Assignment of Errors Relied On.

(Transcript, page 2.)

"1. The Supreme Court of North Carolina erred in holding that section 2631 of the North Carolina Revisal of 1905, above referred to, is, as applied to the interstate shipment in the proceedings mentioned, from Burlington, in the State of North Carolina, to Saginaw, in the State of Michigan, a valid exercise of State power, inasmuch as the State statute referred to is, as applied to the shipment in question, a regulation of interstate commerce which is solely within the power of Congress under Article I, section 8, clause 3, of the Constitution of the United States, the benefit and protection of which Southern Railway Company duly and specially set up and claimed in these proceedings.

"2. Said court erred in holding that the State statute referred to is not, as applied to the interstate shipment in the proceedings mentioned, a regulation of interstate commerce forbidden to the States by being conferred exclusively on Congress by Article I, section 8, clause 3, of the Constitution of the United States, the benefit and protection of which said clause of the Constitution the Southern Railway Company duly and specially set up and claimed in these proceedings.

"3. Said court erred in holding that the State statute referred to is not, as applied to the interstate shipment in the proceedings mentioned, a regulation of interstate commerce beyond the power of the State to make, inasmuch as Congress in the Act to Regulate Interstate Commerce had already acted and had thus assumed jurisdiction over the entire subject-matter of this action, the benefit and protection of which act of Congress the defendant, Southern Railway Company, duly and specially set up and claimed in these proceedings.

"4. Said court erred in denying to the plaintiff in error, Southern Railway Company, the right, privilege or immunity of being governed, in respect to said shipment, solely by the Constitution of the United States and the Act to Regulate Commerce of Congress, and in adjudging said plaintiff in error, in respect to receiving, issuing a bill of lading for, and forwarding said shipment, to be subject to the State statute referred to herein, and in thus denying to Southern Railway Company the right, privilege or immunity aforesaid, which it duly and specially set up and claimed in these proceedings."

ARGUMENT.

Introductory.

Plaintiff in error set up the defense that the North Carolina statute under which the penalties were imposed was in contravention of the commerce clause of the Federal Constitution and of the Act to Regulate Commerce as amended, enacted in pursuance thereof, by prayers for instructions in the lower court, which were refused, and by assignment of errors based on such refusal, and insisted upon said defenses in argument at the trial and in the appellate court. The defenses in question were considered by the North Carolina courts and overruled, as will appear from the record and from the opinion of the Supreme Court of North Carolina (Transcript, pp. 38-42).

This case involves the constitutionality, as applied to interstate commerce, of the same statute as that dealt with in Southern Railway Co. *vs.* Reid, 222 U. S., 424, and Southern Railway Co. *vs.* Reid & Beam, 222 U. S., 444, and the facts are so similar to the facts of those cases that the decisions therein are necessarily controlling of this case. We shall have occasion hereinafter (pp. 15-17) to compare the facts in the three cases. It is not, however, believed to be at all necessary, in order to sustain the contention that the cases referred to are necessarily controlling, to show that the facts of this case are on all-fours with the

facts of the Reid and the Reid & Beam cases, for the reason now to be referred to.

The question necessarily decided in the Reid case and in the Reid & Beam case was whether the statute was constitutional as applied to interstate commerce, not simply whether the imposition of the penalties under the special circumstances of those particular cases might or might not have been constitutionally authorized by the State legislature. The decision of those cases concludes the question of the constitutionality of the statute itself, under which the penalties were imposed in the present case.

Our proposition is that the statute cannot be divided into constitutional and unconstitutional applications and condemned in the cases where unconstitutionally applied but upheld under circumstances in which the penalty might validly have been imposed by the State legislature.

This court in the Reid case and in the Reid & Beam case reversed the judgment of the Supreme Court of North Carolina upholding the imposition of penalties which had been assessed by virtue of the North Carolina statute here involved on the ground that the State legislature invaded the domain of Congress when it sought to authorize the imposition of penalties for failure to receive the interstate shipments to which the cases related. It cannot by any possible course of reasoning be argued that the decision of this court did not actually and expressly go at least to that extent.

That being true, we contend that the only facts of this case which need to be considered by this

court are that the penalties have been imposed under the authority of the same statute quoad an interstate shipment; that, these facts being established, it necessarily follows that the plaintiff in error is entitled to relief in this case.

The statute being applicable to the circumstances of each of the three cases, can it be that after having been held invalid in two of the cases it can be upheld as to the third?

The principle invoked is concisely expressed in the opinion of Mr. Justice Holmes for this court in Louisville, etc., R. Co. *vs.* Stock Yards Co., 212 U. S., 132, 144, where, in discussing that provision of the constitution of Kentucky which required a carrier to deliver its cars to another road with no provision for its protection against loss and detention of the cars, it was declared:

> "The constitution of Kentucky is simply a universal undiscriminating requirement, with no adequate provisions such as we have described. The want cannot be cured by inserting them in judgments under it. *The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.*"

The same idea is well expressed by the Supreme Court of Appeals of Virginia in Richmond *vs.* Model Steam Laundry, 111 Va., 758, 760, a case involving the determination whether the ordinance of the city of Richmond was in violation of the Fourteenth Amendment to the Constitution of the

United States. The court, in answer to the argument that it would be time enough to complain of the ordinance when the authority it sought to confer should be arbitrarily exercised, said:

> "The test of the validity of a law is not what has been done, but what may be done, under its provisions."

That these terse statements of the principle are sound is conclusively established by decisions of this court in which the test was applied. Houston, etc., R. Co. *vs.* Mayes, 201 U. S., 321, directly supports the contention we are making. There a Texas statute imposing penalties upon carriers for failure to furnish cars within a designated time was held invalid as applied to interstate commerce on the ground that exceptions were not made for cases which *might* occur in which the carrier might be unable, though not at fault, to furnish the cars within the time specified. The record in that case will be searched in vain for evidence of a wash-out, sudden congestion of traffic, unavoidable detention of cars in the same State or in another State, or any other circumstances which in the opinion of this court should excuse the carrier from furnishing cars applied for. If, then, the proper test had been the validity of the application of the statute under the facts of the particular case, and not the validity of the statute as such, the judgment of the Texas court would, under the principles announced by the court in its

opinion, have been affirmed. But this court took judicial notice of the fact that such calamities or situations *might* occur, and that the statute, for that reason, was "likely" to do great injustice to the carriers, and therefore declared it invalid as applied to interstate commerce and reversed the decision of the Texas court, which had decreed that the carrier should, under the facts of that case, pay the penalties imposed by the statute.

The soundness of the proposition is also demonstrated by the line of cases in this court of which the following are conspicuous examples:

United States *vs.* Reese, 92 U. S., 214.
Trade Mark Cases, 100 U. S., 82.
Baldwin *vs.* Franks, 120 U. S., 678.
Illinois Central R. Co. *vs.* McKendree, 203 U. S., 514.
Employers' Liability Cases, 207 U. S., 463.

The opinion of this court in the case last cited is summed up in the last paragraph thus (page 504):

> "Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and non-enforcible."

These cases involve injuries to employees of common carriers engaged in interstate commerce while engaged in such commerce. As indicated in the opinion of the court and afterwards decided in the case of Mondou *vs.* New York, New Haven & H. R. Co., 223 U. S., 1, it was within the power of Congress to impose liability upon the facts involved in the Employers' Liability Cases, yet this court decided that the act was not enforceable, following the line of decisions, above referred to, holding that a statute invalid in part cannot be enforced even in cases where only the valid part is applicable if the valid and invalid portions are inseparable. If, then, this court could not separate the Employers' Liability Act of 1906 so as to uphold it as to interstate commerce, how is it possible that the North Carolina statute involved in this case could be held invalid upon the facts involved in the Reid case and in the Reid & Beam case, and yet upheld in this case, even though the facts in this record (which is not the case) should present a situation with which the legislature of North Carolina might constitutionally have dealt?

If it is for the court to declare in each case whether the carrier should or should not be excused upon constitutional grounds from the payment of the penalties prescribed by the statute upon the particular facts of the case, the law would in fact be enacted by the judiciary, *after* the matters legislated about had taken place, and no one could look to the terms of the enactment

of the legislative department of the Government for guidance as to his future conduct. Such a situation recalls the Chinese law which declared that all wrongdoers should be punished, without defining what constituted a wrong.

In the Illinois Central case, *supra*, this court quoted from the Reese case, *supra*, as follows:

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there."

The same situation is presented in this case.

In the Reese case Chief Justice Waite aptly characterized the state of affairs which would exist if it were competent for statutes to be saved from unconstitutionality by the refusal of the courts to apply them in special cases (page 221):

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

See Roller *vs.* Hardy, 176 U. S., 398, 409, for a similar commentary.

Had the Supreme Court of North Carolina construed the statute so as to confine it within the limits in which State legislation can validly operate, or by construction separated it into valid and invalid provisions and this case were found to fall within the valid portion of the statute, a different situation would be presented, because this court would be bound by the State court's construction of the statute. The North Carolina Supreme Court has not, however, placed such a construction upon the statute, as is sufficiently demonstrated by the Reid case and the Reid & Beam case, and, in fact, by the case at bar, and therefore no possible distinction between this case and the line of cases above referred to, ending with the Employers' Liability Cases, can be made on the theory that this case involves a State statute while those cases related to acts of Congress.

We repeat that the test is not whether the State legislature might have enacted a valid statute under which the penalty in question could law-

fully have been visited upon the plaintiff in error for the acts or omissions on account of which this case was instituted, but whether the State has enacted a law which, so far as interstate commerce is concerned, is valid as applied to all cases falling within it. It is true that courts do not sit to determine moot questions, and that one may attack the validity of a law only "by reason of an interest in the litigation which has suffered or may suffer" (Tyler *vs.* Judges, 179 U. S., 405; Turpin *vs.* Lemon, 187 U. S., 61), but one upon whom a penalty has been imposed under the provisions of a statute has an interest which has suffered, and is entitled to challenge the validity of the statute as applied to all cases within its operation. Otherwise, the question of the constitutionality of a penal (or, indeed, any) statute, as a statute, could never arise, and all the statutes on the books would be valid; the question, in each case, would simply be, not whether the statute was invalid, but whether the statute could be constitutionally applied so as to penalize the particular person under the special facts of the case.

We may sum up this part of the discussion by a quotation from another opinion delivered for this court by Mr. Justice Holmes, expressing in concrete form the general principle above stated. In Strickley *vs.* Highland Boy Mining Co., 200 U. S., 527, 530-31, he declared:

> "The single question, then, is the constitutionality of the Utah statute, and the par-

> ticular facts of the case are material only as showing the length to which the statute is held to go."

The facts of this case, however, cannot have even that much materiality, since the statute has already been held by this court to go beyond the bounds of the power of the State.

The statute is invalid in that it seeks to regulate a subject the control of which has been assumed by Congress, and in that it imposes a burden upon interstate commerce.

This proposition is established by the decisions of this court in the Reid and Reid & Beam cases.

If the proposition to the support of which we have been addressing ourselves is sound, there is no need to comment upon the facts of this case further at least than simply to show that the plaintiff in error was penalized for failure to receive an interstate shipment under the same statute as that involved in the Reid and Reid & Beam cases.

We shall, however, call attention to the similarity of the facts in the three cases.

Comparison of the Facts with the Facts in the Reid Case and in the Reid & Beam Case.

In all three cases articles were tendered to a local agent of the Southern Railway Company at a point in North Carolina, prepayment of freight offered, and a through bill of lading demanded to a

destination without the State of North Carolina and on the line of another carrier. (The court will take judicial notice that the lines of Southern Railway Company do not extend into Michigan. United States *vs.* The Montello, 11 Wall., 411, 444; Harper Furniture Co. *vs.* Southern Ry. Co., 144 N. C., 639.) In all three cases the agent refused to receive the articles and issue a through bill of lading because of not having at his agency information as to the rate to destination, it further appearing in the Reid & Beam case that the agent could not ascertain the location of the point of destination, the shipper naming it as "Scottsville," Tennessee, whereas the point in question was in fact "Scottville," Tennessee.

In the Reid case $25.00 as damages under the statute, in addition to the penalty, was fixed in an agreed statement of facts and judgment was for $275.00. In the Reid & Beam case and in this case no damages in addition to the penalties were claimed. In the Reid & Beam case there was judgment for $350.00; in this case judgment was for $2,000.00 (plaintiff alleging—and the jury finding—that the penalties which had accrued under the statute amounted to $3,050.00, but remitting all in excess of $2,000.00).

In the Reid case it appeared that no rate applying to shipments between origin and destination had been established. In neither the Reid & Beam case nor in this case does it appear from the record whether or not rates applicable to the

transportation in question had been filed with the Interstate Commerce Commission in obedience to the Act to Regulate Commerce. It does appear that such rates were not on file at point of origin. In the Reid case, upon the establishment of a joint and through rate, the goods were received and a bill of lading issued; in the Reid & Beam case and in this case the goods were received and bill of lading issued when the agent at origin had succeeded in obtaining information through his superior officer as to the correct rate to be applied.

It seems inconceivable, in view of the above comparison of the facts in the cases decided by this court with the facts in this case, that any distinction can be drawn which would so much as require consideration of the question as to whether the decisions referred to are controlling. We can see no room for an argument to the contrary. But if there could be pointed out some basis for an argument that the facts in this case are in any substantial respect dissimilar to those in the Reid and the Reid & Beam cases, the futility of such an argument would seem to be demonstrated by pointing out that the penalties were imposed for failure to receive an interstate shipment and that this court has held that Congress has taken "control" of that "subject-matter," has "taken possession of" that "field." Southern Ry. Co. *vs.* Reid, 222 U. S., 424, 437.

Let us now analyze the construction placed upon the statute in the case at bar.

Construction of the Statute in the Case at Bar.

Plaintiff demanded of the carrier a through bill of lading from Burlington, N. C., to Saginaw, Mich., offering to prepay the freight charges. That was the condition upon which the tender of the goods was made and the refusal to receive the goods on the terms thus defined by the shipper and issue a bill of lading in the form demanded is the basis upon which liability for the penalties prescribed by the statute is predicated. The agent did not have the rate to Saginaw, Mich. Carriers do not have, and in the nature of things it would be impossible for them to have, on file at every station rates to every other railroad station in the United States upon every article capable of being transported by railroads. There is no Federal law requiring that they should do so. Under section 6 of the Act to Regulate Commerce, as modified by the Interstate Commerce Commission (order of June 2, 1908) under authority expressly conferred in the act, a carrier is required to file at stations only those tariffs which contain rates applying from such stations and *which are issued by the carrier or to which it is a party.*

If the decision of the Supreme Court of North Carolina in this case be upheld, then a carrier operating in that State must issue a through bill of lading, when demanded, from any point on its line in North Carolina to any railroad station in the

United States. Thus, we will have the State legislating concerning through routes and arrangements between interstate carriers, notwithstanding that these are matters over which Congress has assumed control by declaring that carriers shall establish through routes and by vesting in the Interstate Commerce Commission the power to establish through routes and joint rates.

To enable the carrier's agent at point of origin to issue a through bill of lading at once and collect the proper charges (*i. e.*, theoretically, for as a practical matter it often could not be done), it would be necessary to keep on file in accessible form at such points not only all tariffs which that carrier issues, or to which it is a party, but also all tariffs filed by all carriers with the Interstate Commerce Commission, thousands in number, which would require a great amount of space for filing and doubtless in many instances would require the construction of warehouses. Without elaborating as to the impracticability of adopting such a course, we submit that it is obvious that such a requirement would greatly burden interstate commerce and invade the field of which Congress has assumed control.

If it be suggested that the carrier might avoid the penalties by accepting the shipment and issuing the through bill of lading, collecting the charges for the transportation from origin to the point on its own line where delivery to the con-

necting carrier would be made, the reply is that such local rate might and often would be different from the initial carrier's proportion of the through rate to destination.

Nor is the difficulty met by the suggestion that the carrier may issue a prepaid bill of lading and extend credit to the shipper until the correct amount of charges can be ascertained, for State regulation involving the requirement that the carrier extend credit to shippers would impose a burden upon interstate commerce, as well as interfere with the policy of Congress entrusting the matter of rates and enforcement of the collection thereof to the Interstate Commerce Commission.

The only other possible course open to the carrier, in attempting to avoid the penalties, would be to issue the bill of lading and let the charges follow; but, aside from the fact that this would involve the giving of credit and the lien of the carrier for the charges might be insufficient security, such an arrangement would hamper and disarrange accounting between connecting carriers, which is based on revenue billing, *i. e.*, waybills showing the rates and charges. Under the rules universally adopted by railroads as necessary to proper accounting and to the safeguarding of their revenues, shipments are not permitted to move an inch without the rate applicable thereto appearing in the way-billing. Here, again, we would have a burdening of interstate commerce and a trespass upon the congressional field. Fur-

thermore, the connecting carrier might demand prepayment of the charges before accepting the goods, thus making it necessary for the initial carrier to pay out its own money on behalf of the shipper; and in any event the initial carrier would itself part with possession of the goods without having collected its charges and would be dependent upon other carriers for the enforcement of the lien and final reimbursement.

All of these suggested methods of avoiding the keeping of all tariffs on file at each station present the following insuperable objection, viz., that in many instances there are several routes via which the shipment might be transported to destination and, without having all the rates on file, the agent at point of origin would not know how to route the shipment so as to give the shipper the benefit of the lowest rate, to which, under the rulings of the Interstate Commerce Commission, the shipper is entitled. Thus, claims for reparation due to so-called "mis-routing" would multiply, confusion would result, and the payment of reparation claims would result in the carrier's incurring another sort of penalty, viz., that involved in refunding a part of the freight charges which accrued for the actual service rendered.

Surely it is preferable that the necessary information as to the rate applying to shipments as to which the originating carrier has not issued or concurred in a tariff should be secured by the agent at point of origin, by wire, if necessary,

from the office of a superior officer, expert in the complicated matter of tariffs and especially provided with the necessary information and data and especially charged with the duty of advising local agents as to rates, even if at times delays may occur, rather than that the local agency should be burdened with all tariffs and the local agent required to ascertain the correct rate to destination in all cases by examination of tariffs issued by all other carriers as well as tariffs to which his employer is a party. Such an attempt to make every local agent a rate expert to the extent here suggested, familiar not only with tariffs but with the rules of the Interstate Commerce Commission on the subject, would necessarily often fail to enable the carrier to issue a through bill of lading and collect the correct rate and would simply result in breaking down the policy of the Federal law by increasing the number of cases in which a greater or less rate than the lawful one is collected. The truth is that the matter of receiving and issuing bills of lading for interstate shipments is inseparable from the matter of interstate rates and the State cannot control one without in effect regulating the other.

The necessary effect of the statute under the circumstances stated would be to disarrange the conduct of interstate transportation in an aspect which Congress considers vital, viz., in the matter of tariffs of rates and the collection of the lawful charges. If the State be permitted thus to operate

upon matters necessarily involving the publishing and collecting of interstate rates, the policy of Congress is to a substantial extent broken down and a burden laid upon interstate commerce.

But, as above stated, we have a case here where the carrier was called upon to issue a through bill of lading prepaid to destination, and, because it refused to accept the tender of the goods on such terms owing to its inability to collect the correct amount of prepay, penalties amounting, according to the verdict of the jury, to $3,050 accrued under the statute ($1,050 of which was remitted by the plaintiff). The statute not only sought to force it to issue a through bill of lading to a point on the line of another carrier, but to issue a prepaid bill of lading without knowing how much to collect.

Attention is called to the dissenting opinion of Judge Brown, concurred in by Judge Walker, at pages 44-46 of the transcript, where these questions are discussed. At page 44 Judge Brown says:

> "It would seem to me that a statute which permits the recovery as penalty of over $3,000 in a small transaction by a party who has sustained no loss and claims no actual damage, does impose an unreasonable burden upon interstate, or any other kind of commerce, which few common carriers can bear and still perform their duties to the public."

In this connection the language of Mr. Justice McKenna, in Southern Ry. Co. *vs.* Reid, 222 U. S., 424, 442-3, seems to us very suggestive:

> "But if there be a middle ground, it certainly can be argued that it is passed when the State regulation burdens interstate commerce, and whether a regulation has such effect may be determined by its sanctions. If a penalty of $50 for refusing to receive freight 'when tendered' be no burden on interstate commerce beyond the power of a State to impose, would a penalty of $100 or $1,000 likewise be no burden? May not the power which is competent to impose a penalty select its amount? The penalty of the North Carolina statute, it is to be remembered, is independent of the damage received, and what excuses or defenses may be offered the decisions of the court leave in doubt. The statute seems to permit none. The case at bar illustrates somewhat its peremptory character, and the case which was argued with this (Southern Railway Company *vs.* Reid and Beam, *post*, p. 444) still more so. The plaintiffs in that action sued for $750 for refusal to receive and forward a carload of shingles and recovered $350, although one of them testified that they 'never lost a cent.' The circumstance was declared by the court, citing a prior case, to be immaterial, as the penalties were 'not given wholly on the idea of making pecuniary compensation to the party injured, but usually for the more important purpose of enforcing the performance of a duty required by public policy or positive statutory enactment.' The policy

> of the statute, then, is to require the acceptance of freight 'when tendered' with daily accumulating penalties upon refusal to do so. If such power be conceded, what is the limit of its exercise, either as to conditions or penalties?"

Provisions of the Act to Regulate Commerce by which Congress Has Taken Possession of the Field.

Many of the pertinent provisions of the Act to Regulate Commerce were specifically referred to in the Reid case, 222 U. S., 424, and it was there shown that the very statute here involved invades a field occupied by Congress.

We shall not reargue the Reid case, but for convenient reference some of the pertinent provisions of the act as it stood at the time to which this case relates (after the Hepburn act and before the Commerce Court act of 1910, as in the Reid case) may be referred to:

Section 1, paragraph 2, provides that

> "the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage * * * and all services in connection with the *receipt* * * * and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to *provide* and *furnish* such *transportation upon reasonable request therefor.*"
>
> Reid Case, 222 U. S., 424, 440, 441.

Section 3 prohibits the making or giving of any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic in any respect whatsoever or the subjecting of any such person, etc., to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Reid Case, 222 U. S., 424, 438, 439.

Section 6 requires the filing and publishing of tariffs of rates and prescribes the manner in which they shall be filed and published and the places at which they shall be posted and kept open to public inspection, and this section gives authority to the Commission to modify the requirements as to "publishing, posting, and filing of tariffs," which power the Commission has exercised in its order of June 2, 1908, which limited the tariffs necessary to be filed at stations to those issued by the carrier or its agent or to which it is a party.

This section also prohibits departure from such tariffs lawfully filed and published.

Reid Case, 222 U. S., 424, 438.

Section 6 also provides that no carrier

> "shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and

published in accordance with the provisions of this act."

Reid Case, 222 U. S., 424, 441, 442.

Section 15 authorizes and requires the Commission, whenever, after full hearing, it shall be of opinion that

> "any regulations or practices whatsoever of such carrier or carriers affecting such rates are unjust and unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe * * * what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, * * * and shall conform to the regulation or practice so prescribed."

Section 13, paragraph 1, provided:

> "That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall

be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Section 14, paragraph 1, provided:

> "That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

Section 15 provides for the establishment by the Commission of through routes and joint rates. See also section 1, par. 2.

Section 20 provides:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State *shall issue a re-*

ceipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass," etc.

Reid Case, 222 U. S., 424, 440.

Section 23 of the act provides:

"That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to *move and transport the traffic*, or to *furnish cars or other facilities* for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pend-

> ing the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."
>
> (Act of March 2, 1889.)
>
> See also the provisions of section 20 relating to mandamus.

Though doubtless supererogation, in view of the opinion in the Reid case, we insert here comments upon the provisions of the act which have been quoted showing their relevancy to the case at bar.

We have seen that Congress has declared (sec. 1, paragraph 2, of the act) that transportation shall be furnished "upon reasonable request therefor," and defines transportation as including cars and other instrumentalities and facilities of interstate shipment and carriage, and "all services in connection with the *receipt*, delivery, * * * and handling of property transported."

This provision alone is controlling of the case as is indicated by the following taken from the opinion of this court in the Reid case (pp. 440-441):

> "The Supreme Court of the State decided, as we have seen, that the statute deals with a common-law duty simply, one which attaches before freight enters into interstate commerce, and hence concluded as follows: 'The statutory enforcement under penalty of the common-law duty to accept freight "whenever tendered" is not within the scope or terms of any act of Congress. It

> is neither an interference with nor a burden upon interstate commerce.' We are unable to agree with the conclusion. It would destroy absolutely Federal control until the freight was in the possession of the carrier, and is directly contradictory of the provision of the Interstate Commerce Act which we have quoted."

The Supreme Court of the State has construed the statute as imposing a penalty, though the receipt for transportation of the freight tendered would inevitably result in the congestion of the carrier's facilities (see *infra*, pp. 48-53); though the carrier might be powerless to transport the freight on account of an embargo created by a connecting carrier (see *infra*, pp. 53-55); though the receipt and transportation of the property might involve a violation of section 6 of the Federal act. But even if the statute should be construed to impose the same affirmative duties upon the carrier as are prescribed by Congress in the "reasonable request" clause, the State statute would be invalid as invading the field of which Congress has taken control.

> Reid Case, 222 U. S., 424; Reid & Beam Case, 222 U. S., p. 444.

But we submit that the North Carolina statute, as construed by the Supreme Court of the State, imposes upon the carrier in the matter of receiving freight for transportation much more rigorous and unbending obligations than are imposed by

the congressional rule of furnishing transportation "upon reasonable request." The respective rules of Congress and of the State are thoroughly inconsistent. Not only is it apparent that there are necessary conflicts in the matter of the substantive regulations of the State and the Federal statutes, respectively, but, even if substantive matters were regulated in identically the same manner, there would inevitably be conflicts in the administration of the State and of the Federal laws, and the remedies of the party aggrieved are entirely different in the two codes of law.

Attention is also called to the provisions of section 6 of the act where the carrier is expressly forbidden to engage in the transportation (defined in section 1 to include "all services in connection with the *receipt* * * * of property transported") of property unless it has filed and published its rates as required in the act. In the face of this prohibition by Congress, can the State validly declare that interstate freight shall be *received* "whenever tendered," irrespective of whether the carrier has or has not complied with the condition precedent expressly imposed by Congress? Congress says to the carrier which has not published and filed the rates: "Thou shalt not receive;" the State commands: "Thou shalt receive." Which shall the carrier obey?

With reference to this provision of the act of Congress, this court, in the Reid case, declared (p. 442):

> "If the carrier obey the State law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the State law. Manifestly one authority must be paramount, and when it speaks the other must be silent."

The extent to which Congress has taken control of the field is emphasized when the machinery which Congress has provided for the administration and enforcement of the act is considered, for example in sections 13 and 14, and it is made all the more clear that it is inconsistent with the carrying out of the intent of Congress that State laws should operate upon the subject-matter. An illustration will make our position clear.

Suppose a North Carolina shipper who is engaged in sending goods to market in other States feels that the carrier is subjecting him to an unreasonable prejudice in that it promptly receives for transportation the goods of his competitor while refusing to receive and issue bills of lading for his shipments promptly, making various excuses for its conduct. Such shipper, resolving to put a stop to the discrimination, brings action in the State court for the recovery of the penalties and damages provided by section 2631. At the same time he files a complaint with the Interstate Commerce Commission, under section 13 of the Act to Regulate Commerce, alleging a violation of section 3 of the act, and asking reparation for the injury inflicted upon him by the undue discrimi-

nation of the carrier, quoad the very acts and occurrences upon which the action in the State court is based. Now, suppose the State courts construe section 2631 as applying to the case, hold that the matters alleged by the carrier in justification of its conduct are not things which furnish lawful excuses under said section, and that the carrier is liable to penalties and damages under the statute. At the same time the Commission reaches the conclusion that there has been no undue discrimination against the complainant; that there was no legal duty upon the carrier under the provisions of the act to receive the goods any sooner than it did receive them, in view of the circumstances of the case (*e. g.*, an embargo upon shipments to the particular consignee to whom complainant's goods were to be shipped). Accordingly, finding no discrimination, the Commission refuses reparation and dismisses the complaint. Here we have a case where the body created and given power over the subject-matter by Congress determines that the carrier has done its duty with respect to the matters of interstate commerce involved, yet the intention of Congress is completely frustrated by the enforcement of the State statute by the State courts. The State law and the Federal law apply to the same subject-matter and conflicts must necessarily occur between the operation of the Federal law, the enforcement of which is entrusted by Congress to the Commission and to the Federal courts (in which reparation orders of the Commission are

enforced) on the one hand, and the operation of the State law, as administered by the State courts, on the other. Which shall prevail?

Would not the conflict and confusion necessarily resulting from the administration of the State law by the State courts and the Federal law by the Federal tribunals as to the same subject-matter pointed out by this court in Texas, etc., R. Co. *vs.* Abilene Cotton Oil Co., 204 U. S., 426, 440, be inherent in the situation here referred to?

We have also seen that Congress has assumed control of the matter of through routes and joint rates, and has vested power in the Commission with respect thereto.

The court is also asked to consider the provisions of the so-called Carmack Amendment, which was added to section 20 of the Act to Regulate Commerce by the Hepburn Act of 1906. In that amendment Congress in express words regulates the duty of the carrier in the matter of issuing receipts or bills of lading for freight tendered for interstate transportation, and the operation of the State law is thereby excluded. Reid Case, 222 U. S., 424, 440.

Again referring to the administration of the Federal act, we submit that the provisions of sections 20 and 23 of the act are also pertinent, for however the power of the Federal courts (now the Commerce Court) to award the writ of mandamus under section 23 (or section 20) may be circum-

scribed by the jurisdiction of the Commission over the subject-matter, it cannot be questioned that one body or the other, the Federal court of the Commission, has primary jurisdiction to require the carrier to perform its duties under the act as, for example, "to move and transport the traffic, or to furnish cars or other facilities for transportation," where interstate commerce is involved. Suppose, then, that a North Carolina shipper brings action for the penalties and damages prescribed by section 2631 for failure to receive interstate freight for transportation and at the same time applies to the Commission for an order requiring the furnishing of facilities for the transportation and compelling the movement of the traffic tendered, or resorts to the Federal court praying for a mandamus. The conclusions as to the duty of the carrier under the State statute reached by the State court may be entirely inconsistent with the conclusion of the Federal tribunal as to the duty of the carrier under the acts of Congress regulating interstate commerce. Which shall prevail—the State statute or the Federal laws?

We submit that there is nothing in the decision of this court in Missouri Pacific Ry. *vs.* Larabee Flour Mills, 211 U. S., 612, which weakens the force of our position. In that case a controversy arose between the carrier and the mills company over certain demurrage charges which the mills company refused to pay, and the carrier refused to make further delivery to the mills company of

empty cars "eventually to be engaged in interstate commerce" (Reid Case, p. 437) upon the transfer track, its refusal being "based solely upon the ground above stated, and not upon a claim that the compensation paid for the service was unsatisfactory, or that the service constituted a part of interstate commerce, or that the Missouri Pacific did not undertake to perform services of such character" (p. 615). This court held, Mr. Justice Brewer delivering the opinion, that there was no error in the judgment of the Supreme Court of Kansas awarding a mandamus commanding the carrier to resume the transfer and placing of cars for the mills, declaring that the carrier was bound to treat all industries alike, and that this duty arose from the fact that it was a common carrier, and lay at the foundation of the law of carriers, irrespective of legislative action or special mandate. It was claimed by the carrier that Congress had already acted on the subject, in that it had created the Interstate Commerce Commission and given to it a large measure of control over interstate commerce, but this court held that the fact that Congress had entrusted certain powers to the Commission did not, in the absence of action by it, prevent the State court from awarding a mandamus in the enforcement of a plain common-law duty. Mr. Justice Holmes concurred, on the ground that the cars had not been appropriated to interstate commerce, while Mr. Justice Moody and Mr. Justice White dissented, on the ground that

the action of the State court was inconsistent with the power conferred upon Congress by the Commerce Clause of the Constitution and the authority conferred upon the Commission by Congress in the Act to Regulate Commerce.

In the present case there is no question involved as to whether the provisions of the acts of Congress and the power of the Interstate Commerce Commission conferred by those acts prevent the State from enforcing the plain common-law obligations which the common carrier assumes in accepting its charter and engaging in business as such. On the contrary, the question is one of the power of the State legislature to enact a statute covering in part a field and operating upon a subject-matter over which Congress has taken control and which it has regulated by imposing affirmative duties upon the carrier and entrusting the matter of compelling the performance of those duties to the Federal tribunals. The State court has jurisdiction arising out of authority conferred by the State to enforce the legal obligations of the carrier, whether arising out of common law, valid State legislation, or Federal legislation, so far as its powers are not circumscribed by the operation of Federal laws. The State legislature, on the other hand, when Congress has under the provisions of the Federal Constitution taken control of a given field or subject-matter, is powerless to invade that field, although if it should do so the enforcement of the legislation in the State court might not

actually conflict with the Federal law. **Reid Case, 222 U. S., 424.**

Assuming, for the sake of the arugment, that legislation by Congress plays no part in this case, the North Carolina statute contravenes the commerce clause of the Constitution because it seeks to regulate, and, if enforced, will impose a burden upon, interstate commerce.

We shall not argue the proposition that the receiving by a carrier of goods tendered at a point in one State for transportation to a point in another State and the duties of the carrier with respect thereto are matters of interstate commerce and, therefore, within the power of Congress, but will merely cite several decisions of this court conclusively supporting that proposition.

Gibbons *vs.* Ogden, 9 Wheat., 1, 189, 210.

Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 204.

Western Union Telegraph Co. *vs.* James, 162 U. S., 650.

Houston, etc., R. Co. *vs.* Mayes, 201 U. S., 321.

McNeill *vs.* Southern Ry. Co., 202 U. S., 543.

St. Louis, etc., R. Co. *vs.* Arkansas, 217 U. S., 136, 150.

Atlantic Coast Line R. Co. *vs.* Riverside Mills, 219 U. S., 186.

Southern Railway Company *vs.* Reid, 222 U. S., 424, 435.

The decisions of this court clearly lay down the rinciples to be applied in the determination of hether a statute of the sort here involved does or oes not contravene the Federal Constitution. mong others, the following may be cited as owing where the line is to be drawn:

Statutes upheld:

Western Union Tel. Co. *vs.* James, 162 U. S., 650.

Richmond, etc., R. Co. *vs.* Patterson Tob. Co., 169 U. S., 311.

Atlantic Coast Line R. Co. *vs.* Mazursky, 216 U. S., 122.

Western Union Tel. Co. *vs.* Commercial Milling Co., 218 U. S., 406.

Western Union Tel. Co. *vs.* Crovo, 220 U. S., 364.

Statutes condemned:

Western Union Tel. Co. *vs.* Pendleton, 122 U. S., 347.

Central of Ga. Ry. Co. *vs.* Murphey, 196 U. S., 194.

McNeill *vs.* Southern Ry. Co., 202 U. S., 543 (order of North Carolina Commission).

Houston, etc., R. Co. *vs.* Mayes, 201 U. S., 321.

St. Louis, etc., R. Co. *vs.* Arkansas, 217 U. S., 136.

On this branch of the case the question of the nstitutionality of the North Carolina statute will answered by a determination of whether the tute is to be classified with the statute upheld the James case, *supra*, or is to be assigned to the tegory of statutes such as that condemned in the ayes case, *supra*.

In order to answer this question, it is necessary determine what the statute, as construed by the upreme Court of North Carolina, requires.

onstruction of the Statute by the Supreme Court of North Carolina in Other Cases.

The statute requires the carrier to receive eight of the kind which it professes to carry

> "*whenever* tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding."

nd

> "to forward the same by the route selected by the person tendering the freight under existing laws."

nder penalty of a fine of fifty dollars for each day he carrier refuses to receive the freight, and in ddition thereto liability for all damages actually ustained by the refusal to receive.

It will be observed that on its face the statute is rigid, requiring freight to be received *whenever* tendered. No exception is made for any cause or under any circumstances whatever. The statute condemned in the Mayes case contained the proviso that it should not apply "in cases of strikes or other public calamity;" the statute here involved contains no such, nor any, proviso or exception. Unless, therefore, the rigor of the statute has been abated by the construction placed upon it by the North Carolina Supreme Court, we have only to refer to the Mayes decision as conclusive of this case.

Let us see what construction has been placed upon the statute by the highest court of the State.

In the first place, does the phrase "under existing laws" in any way qualify, or modify, the duty to receive freight whenever tendered by defining or describing the circumstances under which the "tender" will give rise to the duty to receive? The question is directly answered by the North Carolina Supreme Court in Alsop *vs.* Express Co., 104 N. C., 278, where it was claimed that the phrase "under existing laws" modified the verb "tendered," and that the tender did not comply with such laws. The contention was emphatically overruled, the court holding that the phrase modified the verb "forward" only; that the requirement was to "*forward* them" (the goods received) "*under existing* laws, fixing the legal relations of consignor and consignee, and the duties and lia-

bility of the carrier company and its connecting lines."

On pages 292 and 293 the conclusions of the court are summed up under three heads, the first two of which are:

> "1. The first clause of section 1964 is in itself a full and complete expression of the legislative intent that goods shall be received *whenever tendered*, and that the language cannot, by any accepted rule of interpretation, be limited further than to require that the tender shall be made during hours that cannot be reasonably claimed, according to the usages of business men at the place of tender, for repose or for taking meals.
>
> "2. The words '*under existing* laws' can be construed to qualify the word 'forward,' and to mean that, at least when the law is applied to railroad companies, the goods shall be shipped within five running days from delivery (as required by the Code, section 1966), and subject to the law fixing the relations of consignor and consignee, the carrier and its connecting lines, while the construction contended for would give the statute no effect, but leave the law as it was before its passage."

In Garrison *vs.* Southern Ry. Co., 150 N. C., 575, an action to recover penalties under the statute here involved for the failure to receive freight tendered for transportation, the court entered into a discussion of the construction of the statute. It

comments upon the decision in the Alsop case just above referred to as follows (p. 582):

> In Alsop *vs.* Express Co., 104 N. C., 278, it was held, in an able and well-sustained opinion by Mr. *Justice Avery*, that the act of 1879 (Revisal, sec. 2631) *enlarged* the common-law duty of common carriers to receive all freight tendered them for shipment by requiring them to do so 'whenever tendered.' In other words, the statute prescribes what is the reasonable time within which they must perform the duty—receive the freight. It must be tendered at a regular depot and during business hours."

In the Garrison case, the court continued (pp. 582, 583):

> "While, both at common law and with the *superadded* duty imposed by the statute, the carrier must receive the freight whenever tendered, yet, upon the authority of the cases cited, if it is shown that by reason of controlling conditions for which the carrier is not responsible, such as the destruction by fire of warehouses, wharfs, platforms, tracks, etc., before a reasonable time to rebuild has elapsed or the unexpected tendering of an extraordinary quantity of freight at a depot, and probably other unforeseen causes, the duty cannot be performed, it would not be liable for the penalty. It is not practicable in the discussion of this appeal to do more than apply these general principles to the facts in the case."

This language occurs in the opinion after a reference to the decision of this court in the Mayes case, and is obviously an attempt to take the statute of North Carolina without the operation of the principles under which the Texas statute was here condemned. These expressions of the North Carolina court are merely dicta, and, in view of the construction placed upon the statute by the State court in this Garrison case and other cases involving the application of the statute to the particular facts involved, are entitled to no weight in this connection. We shall see that the court while keeping the word of promise to the ear breaks it to the hope.

As illustrative of our position with respect to this feature of the case, let us assume that the North Carolina Supreme Court has placed the construction upon the statute—which, we submit, was not placed upon it in the Garrison case, where the duty under the statute is declared to be a duty "superadded" to the common law, but which is suggested by the opinion in this case—that it merely imposes a penalty upon a carrier for failure to perform its common-law duties. Would that be conclusive of the validity of the statute? Would it thereby necessarily fall within the principles which led to the upholding of the statute in the James case? In other words, can a State court, by declaring that a certain duty was owed by the carrier at common law, thereby conclude for this court the question of whether a statute penalizing the failure to perform such act is a regula-

tion of or burden upon interstate commerce? If so, it is within the power of the State courts to nullify the operation of the commerce clause of the Federal Constitution by declaring that the requirement of a certain act on the part of the carrier, no matter how seriously the necessity of performing such act would impede the carrier in the conduct of its interstate business, was merely a requirement that the carrier should perform its common-law duty. It is submitted that it was not the intention of this court, when in the James case it declared that the statute merely required the performance of the common-law duties of the telegraph company, to attach any especial importance to or lay any stress upon the common law as interpreted by the State court, but this court, in determining whether the statute was a regulation of or burden upon interstate commerce, found that the statute was not such a regulation or burden, because it was merely designed to afford a more effective remedy to the person aggrieved in the case of failure or refusal of the carrier to do what was already required of it by the common law, as construed by this court. In other words, if the State court had given an interpretation of the statute as being merely an expression of the common law, which this court considered to create a burden upon interstate commerce, this court would have declared the statute as thus interpreted invalid, although it might yield to the decision of the State court as to what is the common law of the State. The ultimate question is obviously the practical

effect of the statute upon interstate commerce, and not any theoretical question founded upon the State court's construction of the requirements of the common law. This is illustrated in the Mayes case, where this court declared that the Texas statute did not make sufficient allowance "for the *practical* difficulties in the administration of the law."

However this may be, it cannot be contended that there is a common-law duty upon a carrier to issue a bill of lading to a point not on its line.

We have hereinbefore, in arguing for the proposition that the test of the validity of the law is not what was done under it in a particular case, but what might be done under its authority, had occasion to point out that a statute cannot be saved from invalidity by the application of the theory that the courts will relieve from a penalty a party complaining of the imposition thereof where in the particular case the imposition of the penalty was beyond the power of the legislature, and reference is now made to that part of the argument as relevant in the consideration of what weight should be given to the above quotation from the opinion of the North Carolina Supreme Court in the Garrison case, where it undertakes to distinguish the statute from the Texas statute, declared invalid in the Mayes case, by holding out the hope to carriers that they may escape the penalties under circumstances where the State courts in their clemency should deem it proper to abate the rigor of the law.

In this connection the language of Mr. Justice Holmes in Louisville, etc., R. Co. *vs.* Stock Yards Co., 212 U. S., 132, 144, may again be quoted:

> "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such."

What construction was put upon the statute by the actual decision in the Garrison case? The following statement of the facts is taken from the report of the case (pp. 577-8):

> "Plaintiff had contracted to sell lumber f. o. b. cars at Black Mountain, to Westall, at Asheville. Plaintiff hauled the lumber to Black Mountain, loaded it on cars, furnished by defendant 7 June, 1906, and demanded a bill of lading, which defendant's agent declined to give to him, upon the ground that an embargo had been placed upon shipments of lumber consigned to W. H. Westall and English & Co., at Asheville, on account of accumulation of business for them at that point. When the embargo against Westall was placed, there were many loaded cars on defendant's yard at Asheville for him, which he could not or would not handle, and this, with other conditions, created a congested condition of the Asheville yards and caused the embargo to be placed upon shipments to him. There was evidence tending to show that the defendant's yards and tracks at Asheville were congested by an unusual number of cars of freight which were left unloaded; that on 30 May, 1906, defendant's superin-

tendent issued the following notice: "To all agents, Asheville Division: Until further notice, place embargo on all shipments of lumber consigned to W. H. Westall and English & Co., at Asheville, N. C., account accumulation of business for these people at Asheville.' On 16 June the embargo against Westall was canceled.

"There was evidence tending to show that, before and during the time of the embargo, defendant had on its yards and tracks at Asheville for Westall some eighteen or twenty cars of lumber—had more than could be placed on his tracks for unloading—and they occupied other tracks; that they congested the yard and occupied cars that defendant required to move other freight on the line. The traffic in the summer of 1906 was one-third heavier than ever before. Plaintiff testified that he made several demands upon defendant's agent for a bill of lading, each of which was refused, until 20 June, 1906, when he gave him the bill and shipped the car."

Upon these facts the court held that the statute applied, and that the penalty was lawfully imposed, saying (pp. 583-4):

"This brings us to a consideration of the defense offered by defendant as an excuse for not receiving plaintiff's freight. Do they establish or tend to establish any valid, legal excuse? While plaintiff was permitted to place the lumber on the car at Black Mountain, it is conceded that defendant refused to receive it for shipment or to issue

a bill of lading for it. This was a refusal to receive. Twitty *vs.* Railroad, 141 N. C., 355. It is not suggested that any conditions existed at Black Mountain which prevented defendant from receiving for shipment all freight tendered, or that it did not have the necessary cars for the purpose of transporting, or that the track was obstructed. For any and all other persons except Westall and English & Co. the defendant was ready and able to perform its duty to receive freight for shipment. It will be observed that the plaintiff had contracted to sell the lumber and deliver to Westall f. o. b.; hence the defendant, upon receipt of the lumber, would have owed no further duty to plaintiff. For any delay in transportation and delivering within a reasonable time, as prescribed by the statute, defendant would have been liable to Westall. The defense, then, comes to this: Conditons at Asheville, to which Westall contributed by failing to unload and remove freight consigned to him, congested defendant's yards and tracks, kept cars 'tied up,' and prevented it from discharging its duty to other members of the public who might demand its services. We do not think that these conditions excused defendant from performing its duty to plaintiff at Black Mountain. If on account of the conditions existing at Asheville the cars could not be carried there and unload, the defendant should have provided reasonable facilities for caring for the freight at Black Mountain until it could transport it. It will be observed that the duty to receive freight is confined to such as is 'of the nature and kind received' by

such carrier. This relieves the defendant from all unreasonable demands in respect to the character of freight which may be tendered it. When it is remembered that, in addition to these protective provisions, the defense is open to the carrier that unforeseen, unexpected conditions not to be anticipated may be successfully urged as a defense, we do not perceive that any harsh or oppressive measure of duty is imposed upon the carrier."

After referring to the Mayes case, the court declared (p. 584):

"None of the conditions which are suggested are presented in this case, so far as receiving the freight is concerned. It was tendered at the proper place, at the proper time; was of the nature and kind which defendant shipped; the cars necessary for receiving were at the depot; there was no obstruction of the track or shortage of motive power or labor. The only reason assigned was that Westall, by refusing to unload cars consigned to him at Asheville, contributed to the congestion of the yard and tracks at Asheville. In other words, defendant refused to discharge its duty to plaintiff because Westall refused to discharge his duty to defendant at Asheville. We cannot think this a valid excuse.

"We do not intimate that defendant has any right to issue an embargo upon one or more of its customers or patrons and refuse to carry or receive any freight for him. To permit this to be done would empower the carrier to discriminate, not only against

him, but aginst other persons from dealing with him."

Again (pp. 585-6):

> "On the other hand, we do not wish to be understood as intimating that one or more patrons of a common carrier may, by refusing or failing to receive freight consigned to him, so monopolize the car tracks, etc., as to prevent or interfere with it in the discharge of its duty to the public. The statute enacted for the enforcement of the duties of common carriers, imposing penalties, are (sic) not intended to simply penalize railroads, but to secure prompt, efficient service to all and not a favored few. The patrons owe duties to carriers and to other patrons. Reasonable rules and regulations may be made, either by the railroads or the Corporation Commission, to enforce these relative rights and duties."

The court here declares that the carrier did not sufficiently comply with the statute by permitting the freight to be loaded on its car; that it must receive "for shipment," must issue its bill of lading, in order to avoid the penalties. It was necessary for the carrier either to refuse to receive the goods and incur the penalties prescribed in section 2631, or receive them, thus becoming responsible for their safety and exposing itself to suits to recover damages for delay in transportation. If it had received the car of freight and carried it to destination, the congestion at that point would have been to that extent aggravated and equip-

ment needed by the carrier to move other freight, as shown by the record, to that extent tied up. The statute as construed in this case declares:

> "Receive for transportation, though you cannot make delivery, though until delivery you are responsible for the goods, and though by receiving you tie up equipment needed for the performance of your duties to intrastate and interstate commerce and obstruct the movement of such commerce by increasing the congestion of your facilities."

Suppose—and the court under the decision in the Mayes case should test the act by imagining situations that may reasonably arise—a thousand carloads of freight had been tendered the carrier at various points in North Carolina for transportation and delivery to Westall at Asheville, what would have been the effect of the statute upon interstate commerce, if enforced as it was in the case under discussion?

Let us consider the case of Wampum Cotton Mills *vs.* Carolina, &c., R. Co., 150 N. C., 608. This was an action for penalties under section 2631 for the refusal of the defendant to receive a carload of cotton tendered at Lincolnton, N. C., for transportation and delivery to the South Atlantic Waste Company, Charlotte, N. C. Defendant's agent declined to receive the shipment, assigning as the reason that he had instructions not to receive shipments consigned to the Waste Company because an embargo had been placed against that

company by Southern Railway Company, which connected with the defendant at Gastonia and the line of which extended thence to Charlotte. It was in evidence that the tracks and yards of Southern Railway Company at Gastonia were congested. The defendant's agent offered to issue a bill of lading "subject to delay on account of embargo at Gastonia." Plaintiff declined to accept this proposal and suggested to defendant's agent to carry the goods to Gastonia and tender them to the Southern. The court held that the statute applied, saying (p. 614):

> "The sole question is whether the reasons assigned by defendant for refusing to receive for shipment constitute a legal excuse. There is no suggestion that the defendant's warehouse at Lincolnton was insufficient to care for the freight until it could be shipped, or that defendant did not have the cars, motive power, and other facilities for carrying the freight to Gastonia and tendering it to the Southern Railway. Defendant's agent says that it could have been handled as far as Gastonia. It was clearly its duty to comply with the requirement of the statute by receiving for shipment and throwing upon the Southern Railway the responsibility for failing to perform its duty at Gastonia. The fact that the Southern Railway maintained an embargo upon shipments to the waste company at Charlotte could not excuse the defendant from discharging its duty at Lincolnton. We have no doubt that the defendant's officers and agents acted in good faith in endeavor-

> ing to induce the Southern Railway to promise to take the freight at Gastonia, but this did not measure up to the standard of its common-law or statutory duty. It should have received the freight, carried it to Gastonia and then tendered it to the Southern Railway."

Surely in this case the defendant was between the devil and the deep sea. It must either receive the freight and issue a bill of lading obligating it to carry the goods to destination or at least to deliver them to its connecting carrier en route when it knew that such delivery could not be effected, thus rendering itself responsible for the safety of the cotton indefinitely and uselessly tying up its equipment; or else run the risk of the penalties prescribed in section 2631. It chose the latter alternative, and was mulcted in penalties. If it had chosen the former course the result might have been even more disastrous.

In this connection see the decision of this court in St. Louis, &c., Ry. Co. *vs.* Arkansas, *supra*, 217 U. S., 136, where the Arkansas statute was construed by the State court to apply to a case where the inability of the carrier to furnish the cars demanded was due to the fact that a large part of its freight equipment had been delivered to other carriers under the rules of the American Railway Association. The Arkansas court held that the statute did not make an exception under such circumstances, but this court held that, as applied to

such a case, the statute was a burden upon interstate commerce, pointing out that the carrier was powerless to change the rules of the association, and must either "desist from the interchange of cars with connecting carriers for the purpose of the movement of interstate commerce," or "conduct such business with the certainty of being subjected to the penalties which the State statute provided for." Practical considerations determined the case. The North Carolina statute is construed in the case under discussion to make no exception of a case where the defendant carrier was powerless to *deliver* the property tendered had it accepted it.

The construction placed upon the statute in the Reid case (150 N. C., 753) and Reid & Beam case (149 N. C., 423) is familiar to the court. The facts of these cases are referred to herein at pages 15-17.

This decision of the Supreme Court of North Carolina in this case is reported in 152 N. C. Reports at page 70. It should be observed that the penalties began to accrue immediately upon the refusal to receive and issue the through bill of lading; not from the time the rates could be ascertained in the exercise of due diligence. And, as pointed out in the dissenting opinion, the statute was held to warrant the recovery of a penalty of over $3,000 by a party who sustained no loss and claimed no actual damage.

Is the James Case or the Mayes Case the Analogy to be Applied?

Having pointed out the construction which has been put upon section 2631 by the highest court of the State by actual decision, as distinguished from *obiter dicta*, the court is asked to consider whether the statute is like the Georgia statute upheld in the James case or like the Texas statute condemned in the Mayes case.

The common-law duty of the carrier in respect to the receiving of goods for transportation is to receive them "upon reasonable request therefor" (see Hannibal & C. R. Co. *vs.* Swift, 12 Wall., 262, 270), and this is likewise the national policy in respect to the regulation of interstate commerce, as shown by the language of the Interstate Commerce Act, section 1.

We submit that this principle of the common law is denied by the North Carolina statute here under consideration, as construed by the Supreme Court of North Carolina in the case we have referred to. That court held in the Reid and Beam case that the statute requires the acceptance by the carrier of the goods and the issuance of a bill of lading therefor, although the shipper gives for the point of destination an incorrect name, although the goods are destined to a point on the line of an independently operated carrier which is a mere industrial siding and where there is

neither depot nor agent, to which there was no published through rate and to which no shipment had ever been carried by a railroad, and that the goods must be accepted under these circumstances by the carrier without allowing any time for inquiry as to the point of destination and without allowing any time for the establishment and publication of through rates, and in a case where the tender was to prepay the freight. It held in the Reid & Reid case that the statute of the State required the acceptance by the carrier of the shipment for a point on the line of another carrier, although there was no established rate for such shipment and although the Interstate Commerce Act prohibited the acceptance and carrying of the shipment except at rates duly filed and published as required by that law. A similar situation is presented by the facts of the case at bar.

We also submit that the benefit of the common-law rule that goods shall be received for transportation "upon reasonable request therefor" is denied by the North Carolina statute as construed and applied in the Garrison case, *supra*, and in the Wampum Cotton Mills case, *supra*. It is universally recognized that the carrier has a right to refuse to receive goods for transportation in a situation not created by its own default where it is unable to effect the transportation and delivery of such goods owing to the congestion of its facilities or to an embargo laid by a connecting carrier on account of congestion on the latter's lines. In such

a case receipt of the goods for transportation would simply further congest the facilities of the carriers to the detriment of the interests of the public and of commerce, intrastate and interstate, without rendering any benefit to any one. Nevertheless, in the Garrison case, as we have seen, the statute was so construed as to permit the imposition of penalties upon the carrier for its refusal to receive a shipment consigned to a consignee who was unable to accept delivery of cars which had already been placed for delivery to him, and who had thus caused a congestion of the carrier's equipment and facilities in its yards at destination; while in the Wampum Cotton Mills case the statute was construed so as to penalize the carrier for refusal to receive goods consigned to a firm against which the defendant carrier's connection had placed an embargo under circumstances similar to those existing in the Garrison case.

In the James case the statute applied to telegraph companies. Such companies hold themselves out as carrying but one thing, viz., intelligence, and the ascertainment of the correct rate for the service is a simple matter. Railroad companies, on the other hand, carry a vast number of different articles, to which various rates apply, and the ascertainment of the correct rate on a particular shipment is often a complex matter. Telegraph companies, as a rule, carry from origin to destination over their own lines, whereas interstate shipments carried by railroads usually pass

over more than one and often numerous lines. A telegraph message has no inherent value and imposes no responsibility upon the telegraph company other than for its transmission to and delivery at destination. The measure of damages in the case of a delayed telegram is frequently difficult of ascertainment,dependent as it often is upon mental suffering, which cannot be accurately computed by a jury. On the other hand, shipments of freight over a railroad impose upon the carrier responsibility for their safety, and in case of delay the loss to the shipper is readily ascertained. It is also true that the receipt of telegrams by a telegraph company, under circumstances where its facilities are inadequate for the business on hand and offered, does not create congestion in the same degree as is the case under similar circumstances when cars of freight are required to be received by a railroad company. These radical differences between the situation of a telegraph company and that of a railroad company should be borne in mind in determining the practical effect of statutes requiring the receipt in the one case of telegrams for transmission and in the other of freight for transportation.

The Georgia statute in the James case provided that the telegraph company should, during the usual office hours, receive dispatches and, on payment of the usual charges, "transmit and deliver the same with impartiality and good faith and with due diligence under penalty of one hundred

dollars." The only absolute requirement in the statute is that the telegram shall be received. As above suggested, there is no responsibility upon the telegraph company arising out of any inherent value of the message nor any difficulty as to ascertaining the correct rate. The requirement of the statute as to transmission and delivery is not rigid. It is only necessary for the telegraph company under the terms of the statute to exercise impartiality, good faith, and due diligence, these requirements being as flexible as the common law. The difficulty of proving damages in case of delay makes it proper that there should be a definite amount fixed as a penalty for negligence. There is but one penalty in the case of each telegram tendered for transmission. The penalty does not increase day after day indefinitely, as does the penalty prescribed by section 2631 of the North Carolina code.

In the James case the court declares (p. 662):

> "We do not mean to be understood as holding that any State law on this subject would be valid, even in the absence of Congressional legislation, if the penalty provided were so grossly excessive that the necessary operation of such legislation would be to impede interstate commerce. Our decision in this case would form no precedent for holding valid such legislation. It might then be urged that legislation of that character was not in aid of commerce, but was of a nature well calculated to harass and impede it. While the penalty in the present

> statute is quite ample for a mere neglect to deliver in some cases, we cannot say that it is so unreasonable as to be outside of and beyond the jurisdiction of the State to enact."

Mr. Justice Shiras and Mr. Justice White dissented, referring to the Pendleton case, 122 U. S., 347.

Does it not seem apparent from this language of the court that a statute prescribing a penalty of $50 per day, with no time limit to the accumulation of such daily penalties, imposed upon a carrier for its refusal to receive and issue a bill of lading for freight tendered to it for transportation, in view of the considerations above mentioned completely differentiating a railroad company from a telegraph company, beginning to accrue the day after the shipment is tendered, and imposed, although the carrier may be unable, through no fault on its part, immediately to ascertain the point of destination or to find the error in erroneous shipping instructions or to make delivery of the shipment, although no rate to destination may have been established, although, when such rate has been established, the agent of the carrier cannot immediately ascertain such rate—is it not apparent, we say, having in view the complexity of the operations of a great railroad company and the numerous agents it must employ, that the application of the principles laid down in the James case invalidates this North Carolina statute as applied to interstate commerce?

On the other hand, are there any salient considerations leading to the upholding of this North Carolina statute which would differentiate this statute from the Texas statute condemned in the Mayes case? In that case the statute was tested by the determination of whether its provisions, not as a matter of theory but in the light of the practical administration thereof, would regulate or impose a burden upon interstate commerce. The carrier was required by the common law to furnish cars within a reasonable time. The statute provided that the cars should be furnished within a reasonable time, and defined such reasonable time as "not exceeding six days," with the proviso that in case of the application for ten cars or less they should be furnished within three days, and that if the application should be for fifty cars or more the railway company might have ten full days in which to supply the cars. The statute also contained provisions, safeguarding the railroad company against imposition, to the effect that if the applicant should not use the cars he should forfeit a penalty, that the application must be in writing, and that the place designated for the placing of the cars should be at some station or switch on the railroad. It also provided that it should not apply in case of strikes or other public calamities.

The North Carolina statute imposes a penalty for the refusal to receive freight "whenever tendered," and imposes a penalty of $50 for the first day's delay, and the same amount for each suc-

ceeding day *ad infinitum*. As construed by the North Carolina court, *the inability of the railroad company to deliver in no way excuses it from the necessity of receiving for transportation.*

It will not do to seek to uphold this statute by referring to the dicta of the North Carolina Supreme Court to the effect that it will relieve from the penalties in cases which appeal to its sense of justice and clemency. This is especially true in view of the actual decisions by that court in these and other cases where perfectly reasonable common-law- excuses for non-receipt of shipments are under the statute disapproved and disallowed. It is not possible for the carrier to know in advance whether the case is such that the penalty will not be imposed by the trial court or will be remitted by the appellate court. It cannot regulate its action by reference to standards of conduct which are in any degree definitely prescribed by law. Being placed in this situation, it must for its self-protection undertake at all hazards to avoid the risk of the accrual of penalties under the statute, regardless of the consequences to the movement of interstate and other commerce. This being true, the relief which may be thereafter granted by the court cannot retroact so as to nullify the burden which has already been placed upon interstate commerce. If this is a government of laws and not of men, as has been frequently declared by this court, the statute cannot be saved from invalidity by the exercise or by the prom-

ised exercise by the judicial department of the State of a power analogous to the pardoning power vested in the executive.

Louisville, &c., R. Co. *vs.* Stock Yards Co., 212 U. S., 132, 134.
United States *vs.* Reese, 92 U. S., 214.
Roller *vs.* Hardy, 176 U. S., 398, 409.

We deem it unnecessary in this connection to refer to other decisions of this court, such as that in the case of Western Union Tel. Co. *vs.* Crovo, 220 U. S., 364, since it is believed that the James case and the Mayes case are thoroughly representative of the two lines of cases referred to on a prior page of this brief (*supra*, p. 40), and contain all the principles which have been applied in other similar cases.

It is, therefore, respectfully submitted that the North Carolina statute is unconstitutional and void, both because it invades the field occupied by Congress and because it amounts to an attempted regulation of interstate commerce.

JOHN K. GRAVES,
Attorney for Plaintiff in Error.

ALFRED P. THOM,
Counsel.

APRIL, 1912.

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No. 236.

No. 850

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs

BURLINGTON LUMBER COMPANY,
DEFENDANT IN ERROR.

Brief for Defendant in Error.

W. H. CARROLL,
Attorney for Defendant in Error.

Lee S. Overman,
of Counsel.

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DEFENDANT IN ERROR.

STATEMENT OF FACTS:

CIVIL ACTION UNDER SECTION, 2631, OF THE REVISAL OF 1905, OF NORTH CAROLINA, FOR WRONGFUL FAILURE TO RECEIVE FREIGHT FOR SHIPMENT, TRIED BEFORE B. F. LONG, JUDGE AND A JURY, AT MAY TERM, 1909, OF THE SUPERIOR COURT OF ALAMANCE COUNTY, WHERE THE BURLINGTON LUMBER COMPANY WAS PLAINTIFF AND THE SOUTHERN RAILWAY COMPANY WAS DEFENDANT. PLAINTIFF HAD JUDGEMENT, AND DEFENDANT APPEALED. AEFIRMED. APPEAL BY THE DEFENDANT, NOW PLAINTIFF IN ERROR, TO THE SUPREME COURT OF THE UNITED STATES.

In this case defendant in error sought to recover of plaintiff in error, the penalty prescribed in section 2631, of the Revisal of 1905, of North Carolina for the failure and refusal of the plaintiff in error to receive for shipment to

Saginaw, Michigan, certain milling machinery, tendered it by the defendant in error on January, 28, 1907, no bill of lading for said machinery being issued until April 3rd, 1908. The Burlington Lumber Company's contention being that the Southern Railway Company failed and refused to receive said machinery for shipment upon tenders made daily and continuously for a period of 65 days, and that by reason of said refusal said railway company became indebted to the Lumber Company in the sum of $3,050.00, all of this amount in excess of $2000.00 being remitted by the plaintiff. The plaintiff in error denied that there was any tender of machinery for shipment, until April, 3rd, 1908, the day on which bill of lading was issued. It alleged that Revisal, 1905, Sec. 2631, was unconstitutional in so far as it affected interstate shipments. It also alleged that the plaintiff had no such interest in the said machinery as entitled it to bring this action. There was a verdict for the Burlington Lumber Company and a judgment in accordance therewith from which the defendant appealed. This judgment was affirmed in the Supreme Court of North Carolina, and the defendant, Southern Railway Company, appealed to the Supreme Court of the United States, upon Assignments of Error, numbered from 1 to 6, inclusive.

BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

All of said assignments of error are so interwoven, that in their last analysis they call in question the constitutionality of Sec. 2631, of the Revisal of North Carolina, especially in so far as it relates to interstate shipments. We find it convenient to discuss all of said assignments of error under one head, as in a nut shell, Plaintiff in error claims that the shipment in this case was interstate commerce before the penalties attached, and therefore repugnant to the Constitution of the United States, and to certain Acts of Congress Regulating Interstate Commerce.

ARGUMENT.

(a)

The duty to receive freight, "whenever tendered," was a common law duty. Alsop vs Express Company, 104 N. C. 278; 10 S. E. 297; 6 L. R. A. 271, cited and approved in Garrison vs R. R., 150 N. C. 582; 64 S. E. 531.

(b)

Plaintiffs contention that this was interstate commerce before the penalties attached, cannot be sustained. Interstate commerce does not and cannot begin until the goods are accepted for shipment and a bill of lading issued. This is held to be the law in Match Company vs Ontonagon, 188 U. S. 94; 23 Sup. Ct. 266; 47 L. Ed. 394; citing Coe vs Errol, 116 U. S. 517; 6 Sup. Ct. 475, 29 L. Ed. 715, where Bradley Judge held that "not till goods have begun to be transported from one state to another do they become the subjects of interstate commerce, and as such subject to federal regulation." In this opinion, 116 U. S. page 528, he says: "It is true it was said in the case of the Daniel Ball, 10 Wal. 565; 619 L. Ed. 999)." "Whenever a commodity has begun to move as an article of trade from one State to another commerce in that commodity has commenced." But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. * * * Until shipped or started on its final journey out of the state its transportation is a matter altogether in FIERI, and not at all a fixed and certain thing." Besides, the statutory enforcement, under penalty, of the common law duty to accept freight, "whenever tendered," is not in the scope or terms of any act of Congress, and is neither an interference with nor a burden upon interstate commerce, but in aid of it.

(c)

The Plaintiff in Error, contends, however, that Revisal 1905, Sec. 2631, giving a penalty for refusal to accept freight for shipment is unconstitutional when the freight is to be shipped into another state, but refusing to receive for shipment is an act wholly done within this state; it is not a part of the act of transportation and our penalty statute applies. Bagg vs Railroad, 109 N. C. 27; (14 S. E. 79;) 14 L. R. A. 596; 26 Am. St. Rep. 569, where the railroad company received the shipment for a point in another state but negligently detained it for five days before shipping. The precise point was raised in Currie vs R. R. 135 N. C. 536; (47 S. E. 654,) in which it was held that this section giving a penalty for failing and refusing to accept for shipment a carload of lumber was not unconstitutional as an interference with interstate commerce when the lumber was offered for shipment to a point in another state. Cited and re-affirmed in Walker vs R. R. 137 N. C. 168; (49 S. E. 841.)

(d)

In Twitty vs R. R., 141 N. C. 355; (53 S. E. 957,) it was held that where the agent held the freight in storage, but failed to give bill of lading because he did not know the rate, that this was a refusal to receive for transportation, and the railroad company was liable for a penalty under Revisal, 1905 Sec. 2631. In Harrell vs R. R. 144 N. C. 532; (57 S. E. 383,) it was held that Revisal, 1905, Sec. 2633, imposing a penalty for failure to deliver freight was valid, though the freight was interstate. There the penalty occurred after the transportation had ceased. Here the penalty occurred before the transportation had been begun and before the freight was even received and accepted for transportation. These penal statutes then, are in aid of Interstate Commerce, and are proper police regulations within the several states.

(e)

In Railroad vs Flour Mills, 211 U. S. 612 (29 Sup. Ct. 214;) 53 L. Ed. 352, the court said: "Notwithstanding the creation of Interstate Commerce Commission, and the delegation to it by Congress of the control of certain matters, the state may, in the absence of express action by Congress or by such Commission, regulate for the benefit of its citizens local matters indirectly affecting interstate commerce."

See also Reid vs Railroad, 150 N. C. 764 where all the authorities are collected and this same question fully and ably discussed.

(f)

The validity of the penal statutes has been before the Courts of North Carolina for consideration in many recent cases. In Efland vs R. R. 146 N. C. 148, being a statute of a kindred nature, the court in speaking of the power of the government to enact regulations of this character said: "The right of the State to establish regulations for the public-service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties is now and has long been too firmly established to require or admit discussion. Citing Harrels Case 144 N. C. 332; Stones Case 144 N. C. 220; Walkers Case, 137 N. C. 168; McGowan's Case, 95 N. C. 417; Branches Case, 77 N. C. 347, Railroad vs Florida, 203 U. S. 261; Railroad vs Holmes, 115 U. S. 513; Mobile vs Kimball, 102 U. S. 691; Munn vs Illinois, 94 U. S. 112. In Holmes case, 115 U. S. 513, Associate Justice Fields says: "The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of

the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statute of nearly every state of the Union provide for the increase of damages where the injury complained of result from the neglect of duties imposed for the better security of life and property, and make that increase in many cases, double and sometimes treble and even quardruple the actual damages." And proceeded further: "And the right to establish such regulations for certain classes of pursuits and occupations imposing these requirements equally on all members of a given class, has been made to rest largely in the discretion of the legislature.

Tullis vs R. R. 175 U. S. 348; Insurance Co. vs Daggs, 172 U. S. 562; McGowan vs Bank, 170 U. S. 286.

(g)

Under the decisions of this Court, the law is fixed, that:

Until some action by Congress, the legislation of a state, not directed against commerce, but relating to the rights, duties, and liabilities of citizens, is of obligatory force, within the territorial jurisdiction, although it may indirectly and remotely affect the operations of foreign or interstate commerce, or persons engaged in such commerce.

Sherlock vs Alling, 93 U. S. 99. And numerous cases Cited, Vol. 2. Digest Supreme Court Reports L. Ed., page 1392.

(h)

And that: When the subjects within the commercial power of Congress are local in their nature or operation, or constitute mere aids to commerce, the states may provide for their regulation and management, until Congress intervenes and supercedes their action.

Cardwell vs American River Bridge Co., 113 U. S. 205,

5 Sup. Ct. Rep. 423. Brown vs Houston, 114 U. S. 622; Glouster Ferry Co. vs Pennsylvania, 114 U. S. 196.

(i)

And further: The regulation of commerce applies to the subjects of commerce, and not to matters of internal police.

U. S. vs E. C. Knight Co., 156 U. S. 1; 15 Sup. Ct. Rep. 249. Cited in U. S. & Trans-Mo. Freight Asso. 166 U. S. 325; Hopkins vs U. S. 171 U. S. 597; 19 Sup. Ct. Rep. 40.

(j)

The Federal power to regulate commerce does not supercede the power of the states to legislate with reference to matters within the state which can be most advantageously regulated by the state itself, such as quarrentine, inspection, health, internal communication, and the like.

Gibbon vs Ogden, 9 Wheat 1. And numerous cases cited L. Ed. Vol. 2., Digest Supreme Court Reports.

(k)

The independence of the commercial power, and of the police power, and the limitations between them, must always be recognized and observed.

U. S. vs E. C. Knight Co., 156 U. S., 1. 15 Sup. Ct. Rep. 249. Cited in U. S. vs Boyer, 85 Fed. Rep. 434; 34 L. R. A. 109.

(l)

Statutes passed under admitted police powers, and necessarily affecting interstate commerce, are not for that reason alone invalid, and if not for some other reason invalid will be respected until Congress acts upon the matter. Huntington vs Georgia, 163 U. S. 299; 16 Sup. Ct. Rep. 1086.

(m)

In local matters concerning the public policy of a state, though incidentally affecting interstate commerce, regulations by the State in the exercise of its police powers, are valid, in the absence of action by Congress. Lake Shore & M. S. R. Co., vs Ohio ex. rel. Lawrence, 173 U. S. 285, 19 Sup. Ct. 465.

(n)

The power whether called police, governmental, or legislative, exists in each state by appropriate enactments, not forbidden by the Constitution to regulate the relative rights of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.

Lake Shore & M. S. R. Co. vs Ohio, 173 U. S. 285; 19 Sup. Ct. Rep. 465. Cited in Detroit vs Detroit Citizens Street R. Co. 184 U. S. 398.

(o)

THE STATUTE IN QUESTION:

Revisal, 1905, Sec. 2631 has been approved and upheld in several of the foregoing cases as a just and reasonable exercise of the power indicated, and both as to inter and intra state commerce. Garrison vs Railroad, 150 N. C. 175; Twitty vs R. R. 141 N. C. 355; Currie vs R. R., 135 N. C. 536; Bagg vs R. R., 109 N. C. 279.

The Defendant in Error respectfully submits to this Honorable Court, that no such federal question has been raised in this case as aught to require the attention of this Court. A State statute imposing a penalty on a railroad for refusal to accept freight tendered for shipment is a valid regulation and in direct and reasonable enforcement of the duties incumbent upon common carriers, and is not

in conflict with the Fourteenth Amendment of the Constitution of the United States, nor repugnant to or in contravention of Art. 1., Sec. 8, of the Constitution of the United States conferring upon Congress the power to regulate commerce between the States. We claim that the penalty is in direct enforcement of the duties incumbent upon the plaintiff in error as a common carrier, and is imposed for a LOCAL DEFAULT, and before the goods were accepted for shipment, and consequently is not a burden upon interstate commerce, but IN AID THEREOF; and in the absence of inhibitive congressional legislation or of interfering action by the Interstate Commerce Commission the matter is a rightful subject of State regulation, and of State legislation.

In conclusion, the defendant in error, respectfully contends, that the plaintiff in error in this case, having been afforded full opportunity to make defence, and the evidence failing to disclose any substantial excuse or explanation for its default, on the facts appearing in this case, a recovery of the penalty imposed by the statute is not an interference with or a burden on interstate commerce prohibited by the Constitution of the United States, or statutes of Congress or by any regulation made by the Interstate Commerce Commission in persuance thereof. We respectfully insist that the judgement of the Supreme Court of North Carolina should be in all respects affirmed.

Respectfully Submitted,

W. H. CARROLL,

Attorney for Defendant in Error.

April 6th, 1910.

Lee S. Overman,

of Counsel.